HOUSE OF COMMONS
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**Report of the Standing Committee on Citizenship and Immigration**

# RESPONDING TO PUBLIC COMPLAINTS: A REVIEW OF THE APPOINTMENT, TRAINING AND COMPLAINT PROCESSES OF THE IMMIGRATION AND REFUGEE BOARD

**Chair**
**Robert Oliphant**

**SEPTEMBER 2018**

**42nd PARLIAMENT, 1st SESSION**

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**Robert Oliphant**
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**Reports from committees presented to the House of Commons**

Presenting a report to the House is the way a committee makes public its findings and recommendations on a particular topic. Substantive reports on a subject-matter study usually contain a synopsis of the testimony heard, the recommendations made by the committee, as well as the reasons for those recommendations.

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# THE STANDING COMMITTEE ON CITIZENSHIP AND IMMIGRATION

has the honour to present its

**TWENTIETH REPORT**

Pursuant to its mandate under Standing Order 108(2) and the motion adopted by the Committee on Tuesday, February 6, 2018, the Committee has studied Immigration and Refugee Board's appointment, training and complaint processes and has agreed to report the following:

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# PREFACE

On 6 February 2018, the House of Commons Standing Committee on Citizenship and Immigration (hereafter referred to as the Committee) adopted a motion to study the Immigration and Refugee Board of Canada (IRB). More specifically, the Committee examined the IRB's processes for appointing and training decision-makers as well as for handling complaints against decision-makers.[1]

From 27 February to 26 April 2018, the Committee heard from 28 witnesses and received six written submissions.[2] The Committee would like to thank the officials from the IRB as well as all witnesses, including academics, lawyers and civil society organizations, for making themselves available to appear before the Committee.

1 House of Commons Standing Committee on Citizenship and Immigration [CIMM], *Minutes of Proceedings*, 1st session, 42nd Parliament, 6 February 2018.

2 CIMM, *Immigration and Refugee Board's Appointment, Training and Complaint Processes*.

# SUMMARY

The Immigration and Refugee Board of Canada (IRB) is Canada's largest administrative tribunal, charged with resolving immigration and refugee cases fairly, efficiently and in accordance with the law. Established by the *Immigration and Refugee Protection Act*, the IRB operates at arms-length from the Government of Canada.

The IRB is composed of four divisions representing both determination and appeal hearings of refugee and immigration cases. While the board is independent in its decision-making function, engagement and collaboration with Immigration, Refugees and Citizenship Canada allows for the delivery of many of Canada's immigration and refugee objectives. Despite challenges, including increasing numbers of refugee claims, Canada's refugee determination system, within which the IRB plays the leading role, has earned an excellent international reputation.

Decision-makers at the IRB are expected to produce fair decisions quickly. They are also subject to codes of conduct that obliges them to act professionally, fairly and with integrity. Recently, cases have surfaced of board members violating these behavioural guidelines. Along with violations, there have been allegations of insensitivity of members and a complaint process that has been reported to be lacking consistency and transparency. For these reasons, on 6 February 2018, the House of Commons Standing Committee on Citizenship and Immigration adopted a motion to study the processes for appointing and training decision-makers, as well as for handling complaints against them at the IRB.

This report sets out a number of recommendations based on the issues heard during the course of the Committee's study. Among these, the Committee would like to highlight that the current processes of hiring public servants and of appointing Governor in Council candidates as decision-makers at the IRB be maintained and that the government consider reviewing both processes within three years.

The Committee also recommends that the IRB commit to a process for continuous improvement of members' continuing education. Specifically, the committee urges improvement in the areas of sensitivity training, trauma-informed investigation techniques and credibility assessment. The Committee further recommends that the IRB review, on a periodic basis, the effectiveness of the board's training guidelines as education and training tools.

Finally, with respect to the IRB complaint procedures, the Committee recommends that the government establish a task force with representation from all departments whose portfolios involve the oversight of federal administrative tribunals to review the need for an independent review board for complaints brought forward by the public. The Committee further recommends that the government consider whether complaints processes against public service positions and Governor in Council appointments within the federal administrative tribunal framework should be subject to different levels or avenues of review.

# LIST OF RECOMMENDATIONS

*As a result of their deliberations, committees may make recommendations which they include in their reports for the consideration of the House of Commons or the Government. Recommendations related to this study are listed below.*


Maintaining public service and Governor in Council appointments at the Immigration and Refugee Board of Canada

**Recommendation 1**

**That the current Immigration and Refugee Board of Canada appointments process for the Refugee Protection Division and Immigration Division, in which merit based appointees are screened and successful applicants are hired as public servants, and for the Refugee Appeal Division and the Immigration Appeal Division, in which merit based appointments are screened and successful applicants are hired through temporary Governor in Council appointments, both be maintained, and that the Government of Canada consider reviewing both processes within three years. ..... 23**

Improving the assessment process of Immigration and Refugee Board members

**Recommendation 2**

**That the screening process for selecting all members of the Immigration and Refugee Board of Canada, either in the written aptitude exam or the interview process, include the evaluation of a candidate's awareness and understanding of discriminatory conduct and the standards of behaviour to which members of the board are to be held. ..... 26**

Appointing Governor in Council members to fill vacancies

**Recommendation 3**

**That the Privy Council Office take all steps possible to expedite recommendations of suitable candidates to the Minister of Immigration, Refugees and Citizenship in order to fill any vacancies in Governor in Council appointees at the Immigration Appeal Division and the Refugee Appeal Division at the Immigration and Refugee Board of Canada. ..... 26**

Improving training at the Immigration and Refugee Board of Canada

**Recommendation 4**

**That the Immigration and Refugee Board of Canada commit to a process for continuous improvement in member education, and, specifically, demonstrate improvement in member education in the areas of (a) sensitivity training, (b) trauma-informed investigation techniques and (c) credibility assessment; and that the Immigration and Refugee Board of Canada review, on a periodic basis, the effectiveness of the board's training guidelines, including the Sexual Orientation Gender Identity Expression Guideline, as education and training tools. ..... 37**

Ensuring a mandatory continuing professional development for members

**Recommendation 5**

**That the Immigration and Refugee Board of Canada institute a more rigorous policy of mandatory continuing professional development for members so that they remain informed of best practices and standards in each area of required competency, including relevant legislation, judicial decisions and procedural fairness; and that an evaluation of members' comprehension and application of this learning play a significant part in their yearly review, with individual programs developed for members requiring additional training or mentorship, additionally, that all guidelines and training tools be continually revised and improved to ensure continuous improvement. ..... 38**

Establishing an independent federal review board for complaints against all federally appointed adjudicators

**Recommendation 6**

**That the Government of Canada, through the Privy Council Office, establish a task force with representation from all departments whose portfolios involve the oversight of federal administrative tribunals to review the need for an independent review board for complaints brought by the public against federally appointed adjudicators, including members of the Immigration and Refugee Board of Canada; and to consider whether complaints processes against public service positions and Governor in Council appointments within the federal administrative tribunal framework should be subject to different levels or avenues of review. ..... 55**

Amending the Code of Conduct for Members of the Immigration and Refugee Board of Canada

**Recommendation 7**

**That the Immigration and Refugee Board of Canada institute an open and transparent process for continuous improvement to its Code of Conduct and that the Immigration and Refugee Board of Canada publish within the Code possible sanctions that could be imposed on a member upon violation of the Code. ..... 57**

Reviewing and reporting back on the complaints process at the Immigration and Refugee Board of Canada

**Recommendation 8**

**That the Immigration and Refugee Board of Canada report back to this Committee in February 2019 with a comprehensive report on the status of complaints against members brought under the current complaints process, and conduct a comprehensive review of the current complaints, with a particular emphasis on the need for independence in the complaints investigation and adjudication process, within three years. ..... 58**

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# RESPONDING TO PUBLIC COMPLAINTS: A REVIEW OF THE APPOINTMENT, TRAINING AND COMPLAINT PROCESSES OF THE IMMIGRATION AND REFUGEE BOARD

## INTRODUCTION

Since 2002, Canada's immigration and refugee protection laws have been established by the *Immigration and Refugee Protection Act*[1] (IRPA), which includes provisions to assess and determine a person's claim for refugee protection in Canada. The Immigration and Refugee Board of Canada is mandated, as an administrative tribunal, to make those assessments and determinations, as well as all other decisions on refugees and immigration matters.

In the past few years, there have been a number of concerns raised about the conduct of certain decision-makers at the IRB during refugee hearings and about the board's complaints process.[2] A *Global News* article[3] published on 8 March 2018 presented two instances where it was alleged the complaints process was ended in an apparently unsatisfactory and non-transparent way following the impugned decision-makers' departure from the IRB. For that reason, the Committee decided to study the IRB's appointment, training and complaint processes, with a particular focus on cultural, sexual orientation, gender identity and gender expression sensitivity.

This report begins with an overview of the IRB, including its structure and the nature of members' work, before delving into the board's appointment, training and complaint processes. Each section will outline the situation as it currently stands before addressing the shortcomings identified by witnesses, as well as possible areas of improvement.

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1 *Immigration and Refugee Protection Act* [IRPA], S.C. 2001, c. 27.

2 Peter Small, "Refugee board judge sought sex, court told," *Toronto Star*, 23 February 2010; Nicholas Keung, "Woman's asylum claim rejected because she didn't seek help after multiple beatings," *Toronto Star*, 29 August 2014; Brian Hill and Andrew Russell, "Lawyers allege 'sexist,' 'aggressive' behaviour by powerful immigration, refugee judges," *Global News*, 29 January 2018.

3 Brian Hill and Andrew Russell, "Refugee judge accused of 'incompetence' in Global News investigation, 'no longer an employee of the IRB'," *Global News*, 8 March 2018.

## OVERVIEW OF THE IMMIGRATION AND REFUGEE BOARD OF CANADA

The Immigration and Refugee Board of Canada is the country's largest administrative tribunal and is responsible for making efficient and fair decisions on immigration and refugee matters in accordance with IRPA. While Immigration, Refugees and Citizenship Canada (IRCC) has overall responsibility for immigration and refugee matters, the IRB operates at arms-length from the government. It reports to Parliament through the Minister of Immigration, Refugees and Citizenship.[4]

Witnesses who appeared before the Committee highlighted that the IRB "enjoys a global reputation as a model of refugee determination"[5] because of its independence as an institution.[6] Ronald Ellis, an administrative law lawyer, academic, adjudicator and tribunal administrator, explained that administrative justice bodies are part of the executive branch and not the judicial branch. They are, nonetheless, non-court judicial tribunals. Their principal purpose is the exercise of quasi-judicial functions. In other words, administrative tribunals implement the executive branch's statutory requirements.[7] In comparison to civil courts, administrative tribunals operate in a particular operational environment. For example, the IRB has an exclusive mandate to resolve all immigration and refugee matters referred to it for a decision. As such, the scope of activity for which the IRB is responsible is narrow, but the number of cases is very large. Those three characteristics of the IRB, which are common to all administrative tribunals,[8] contribute to the requirement for the institution's high level of expertise, which is another one of its central qualities.[9]

Bashir Khan, lawyer, commented that the IRB's independence and expertise are foundational because the IRB "is the guardian of the integrity of our justice system when it comes to refugee adjudication."[10] Raoul Boulakia, lawyer, stated that the IRB is an

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4 Immigration and Refugee Board of Canada [IRB], "Mandate," About the Board.

5 CIMM, Evidence, 27 March 2018, 1215 (Andrew Brouwer, Vice-President, Canadian Association of Refugee Lawyers).

6 Ibid.; CIMM, Evidence, 27 March 2018, 1210 (Preevanda Sapru, Lawyer, As an individual); CIMM, Evidence, 22 March 2018, 1220 (Raoul Boulakia, Lawyer, As an individual); Canadian Council for Refugees, Written submission, p. 1; Sean Rehaag, Written submission, p. 3.

7 Ronald Ellis, *Unjust by Design: Canada's Administrative Justice System*, UBC Press, Vancouver, 2013, p. 3. As referenced in Prof. Ellis' written submission to the Committee.

8 Ibid., p. 191.

9 CIMM, Evidence, 27 March 2018, 1215 (Andrew Brouwer); CIMM, Evidence, 22 March 2018, 1220 (Raoul Boulakia); Canadian Council for Refugees, Written submission, p. 1.

10 CIMM, Evidence, 22 March 2018, 1205 (Bashir Khan, Lawyer, Refugee Law, As an individual).

important institution, not just for "people who rely on the board," but for everyone, because "no one benefits from a system if decisions are made poorly or injudiciously."[11] Andrew Brouwer, Vice-President of the Canadian Association of Refugee Lawyers (CARL) added that this independence also allows the IRB to

> avoid the numerous political traps and pitfalls inherent in refugee determination. After all, a core element of refugee determination is determining whether other states are persecuting their own citizenry, and it also involves frequently condemning the actions of other states in their human rights violations. By leaving this determination to an independent tribunal on a case-by-case basis, for the most part we avoid turning refugees into political footballs to be kicked around or protected, depending on the proclivities of the government of the day. Also, we avoid a situation in which other countries raise diplomatic concerns that the Canadian government is interfering in their domestic affairs by denouncing their human rights violations. Therefore, the independence of the tribunal protects both refugees and the Canadian government.[12]

Paul Aterman, Acting IRB Chairperson, stated that the IRB's independence is ensured only through the independent decision-making of IRB members. According to Mr. Aterman, "nobody at the board will tell a member how to decide in an individual case."[13] However, it is possible to challenge a member's decision as right or wrong in law on appeal either to the appeal division at the IRB or to the Federal Court. In order to understand the work of IRB members, the following sections discuss the structure of the IRB as well as the work of IRB members.

## A. Structure of the Immigration and Refugee Board of Canada

The IRB has its headquarters in Ottawa and offices in Montreal, representing the Eastern Region; Toronto, serving the Central Region; and Vancouver, for the Western Region. The Western Region also has offices in Calgary, Winnipeg and Edmonton. The board is made up of four divisions: the Refugee Protection Division (RPD), the Refugee Appeal Division (RAD), the Immigration Division (ID) and the Immigration Appeal Division (IAD).[14] At its head is a Chairperson, currently Mr. Aterman in an acting capacity. Each division is headed by a Deputy Chairperson, with Assistant Deputy Chairpersons and members who make decisions.[15]

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11 CIMM, *Evidence*, 22 March 2018, 1220 (Raoul Boulakia).

12 CIMM, *Evidence*, 27 March 2018, 1215 (Andrew Brouwer).

13 CIMM, *Evidence*, 27 February 2018, 1145 (Paul Aterman).

14 IRPA, section 151.

15 IRPA, sections 153(2), 169.1 and 172.

## 1. The Refugee Protection Division

The RPD is responsible for making decisions on refugee claims in Canada. Refugee claims are made at the border or inland at Canada Border Services Agency (CBSA) and IRCC offices where they are determined eligible to be heard and then are referred to the IRB. The decision-makers at the RPD must determine if a person, unable to obtain protection from his or her own country, has a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion.[16] In 2012, reforms were implemented to accelerate the hearing of claims.[17] Nevertheless, this left a backlog of cases that were developed under the former rules, called "legacy cases," which are being addressed by a dedicated Legacy Task Force within the RPD. At the end of 2017, the IRB had 43,276 new system claims pending as well as 3,933 legacy claims.[18]

In addition, the RPD is responsible for making decisions regarding the cessation of protected status, which occurs when an individual no longer needs Canada's protection, such as by returning to their country of origin.[19] In 2017, the RPD allowed 12 cessation applications, 18 were withdrawn and 449 were outstanding at the end of the year.[20]

The RPD also hears vacation proceedings that may take away or determine continued protective status: these take place when it is argued refugee status has been obtained fraudulently.[21] In 2017, the RPD allowed 42 vacation applications with 690 applications outstanding.[22]

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16 IRPA, section 96(a); United Nations, *1951 Convention Relating to the Status of Refugees* and its *1967 Protocol Relating to the Status of Refugees*.

17 For more information, see Julie Béchard and Sandra Elgersma, *Legislative Summary of Bill C-31: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act*, Publication no. 41-1-C31E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 16 May 2012

18 IRB, *Refugee Protection Claims Statistics*.

19 IRPA, section 108(2).

20 IRB, *Applications to Cease or Vacate Refugee Protection*.

21 IRPA, section 109(1).

22 IRB, *Applications to Cease or Vacate Refugee Protection*.

The IRB reported to the Committee that in 2017-2018 refugee protection decisions cost approximately $55 million in 2017-2018, including all shared service costs. The RPD had an operational budget of approximately $26 million.[23]

### 2. The Refugee Appeal Division

The RAD was established on 15 December 2012. Its purpose is to review decisions made at the RPD.[24] Not all refugee claimants who have their claims denied have automatic access to the RAD. There are four groups of claimants who cannot appeal an RPD decision: designated foreign nationals;[25] claimants from designated countries of origin;[26] those whose claims were found to have no credible basis and those whose claims are found to be manifestly unfounded or clearly fraudulent;[27] and those whose claims are heard as exceptions to Safe Third Country Agreements (i.e., persons who have family in Canada).[28] There are also three types of decisions that are not eligible for appeal: determinations that a refugee claim has been withdrawn or abandoned;[29] appeal sought by the Minister in relation to decisions made by the RPD on cessation of refugee protection;[30] and the vacation of claims for refugee protection.[31]

Some appeals are dismissed because of lack of jurisdiction or because the appeal file was never completed. Others are counted as dismissed because they have been withdrawn. After review, there are three outcomes: the RAD can confirm the RPD decision, it can refer the decision back to the RPD for a new hearing, or it can substitute the RPD decision with its own decision. As of 31 December 2017, there were 3,700 cases pending at the RAD.[32]

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23 IRB, *Written Response*, "Budget."

24 IRPA, section 110(1).

25 IRPA, section 110(2)(a); A designated foreign national is a person who is part of a group that the Minister of Public Safety and Emergency Preparedness identified as an "irregular arrival."

26 IRPA, section 110(2)(d.1).

27 IRPA, section 110(2)(c).

28 IRPA, section 110(2)(d).

29 IRPA, section 110(2)(b).

30 IRPA, section 110(2)(e).

31 IRPA, section 110(2)(f).

32 IRB, *Refugee Appeals Statistics*.

In 2017-2018, refugee appeal decisions cost approximately $16 million, when factoring all shared costs. The RAD had an operational budget of approximately $2 million.[33]

### 3. The Immigration Division

The ID hears immigration detention reviews at intervals established in IRPA – after 48 hours, seven days and 30 days.[34] The *Immigration and Refugee Protection Regulations* (IRPR) set out specific grounds by which a person would remain in detention: if the individual is a flight risk; if the individual is a danger to the public; or if the individual's identity has not been established.[35]

The ID undertook a total of 11,067 detention reviews in 2017.[36] That year, there were 69 minors and 3,485 adults in detention,[37] 80 of whom were held in detention for more than 365 days.[38] The most frequent ground for detention cited was flight risk.[39]

The ID is also responsible for admissibility hearings that determine if a person can enter or remain in Canada. The ID will conduct a hearing after a CBSA officer submits a report on an individual citing the ground that she or he suspects renders the individual inadmissible. These grounds are listed in IRPA: security reasons; violation of human rights; serious and organized criminality; health reasons; financial reasons; misrepresentation and failure to comply with IRPA.[40] If the ID member concurs with the report, she or he will issue a removal order.[41]

In 2017, the ID received 1,999 reports requiring a hearing; at the end of the year, there were 384 hearings pending. The ID issued 1,497 removal orders, allowed 32 people to enter and 64 to remain in Canada. There were 193 individuals who failed to appear at their hearing.[42]

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33 IRB, *Written Response*, "Budget."

34 IRPA, section 54 for the jurisdiction, section 57 for the periodic reviews.

35 *Immigration and Refugee Protection Regulations*, SOR/2002-227, sections 244 to 247.

36 IRB, *Total Detention Reviews Concluded*.

37 IRB, *Persons Subject to a Detention Review*.

38 IRB, *Detention Reviews by Length of Detention*.

39 IRB, *Grounds for Detention Reviews*.

40 IRPA, sections 34 to 41.

41 IRPA, section 45(d).

42 IRB, *Admissibility Hearings by Region*.

According to the IRB's 2017-2018 budget information, appeals and detention decisions cost approximately $12 million. The ID had an operational budget of approximately $5 million.[43]

### 4. The Immigration Appeal Division

The IAD holds hearings on immigration-related matters such as family class sponsorship appeals, residency obligations and removal order appeals.[44] In 2017, the IAD finalized 3,720 decisions that were appealing a decision on family class sponsorship made at the ID. At the end of the year, the IAD still had 4,444 family class sponsorship appeals pending.[45] The IAD also finalized a total of 1,127 decisions regarding permanent residents' residency obligation, while it still had 1,581 pending cases at the end of 2017.[46] Finally, when the IAD makes an order to stay a removal, it means that the removal cannot be executed. Last year, a total of 1,686 appeals were reviewed at the IAD concerning removal orders issued at the ID and 2,844 cases were still pending as of 31 December 2017.[47]

In 2017-2018, immigration appeal decisions cost approximately $17 million, including all shared service costs. The IAD had an operational budget of approximately $2 million.[48]

## B. Members of the Immigration and Refugee Board of Canada

Members of administrative tribunals make findings of fact and formulate legal opinions. They base their decisions on the relevance, credibility and relative weight of the evidence submitted as well as the adjudicator's opinion about what the law is or what the law requires.[49]

During its study, the Committee learned that, in 2017, 224 members across the four divisions of the IRB rendered 43,153 decisions.[50] Mr. Aterman highlighted that "the pressure to produce fair decisions quickly is unrelenting" in all four divisions. He particularly pointed out that, on the refugee side, the IRB received 47,000 refugee claims

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43 IRB, *Written Response*, "Budget."

44 IRPA, section 63.

45 IRB, *Immigration Appeals Statistics*.

46 Ibid.

47 Ibid.

48 IRB, *Written Response*, "Budget."

49 Ronald Ellis (2013), p. 189.

50 CIMM, *Evidence*, 27 February 2018, 1140 (Paul Aterman); As of April 2018, the IRB had 281 members.

this year, which is more than double the number of claims received in 2016.[51] For that reason, the IRB received an additional budget of $73.7 million in 2018 for a two-year period in order to fill 16 additional positions at the RAD.[52]

The IRB also provides support staff to members. The ratio is a 1.5 full-time equivalent support staff per member.[53] The type of support staff offered can vary by division, but generally include:

- Reception Area Staff, who greet the people who appear before the IRB, answer their general questions and guide them to their hearing room.
- Case Management Officers, who communicate with claimants or appellants or their counsel; provide procedural guidance to ensure completeness of records and compliance with the legislation, rules and regulations; and manage the files to finalization.
- Hearing Support Assistants, who create and maintain the file from the receipt of the claim or the appeal and ensure that all correspondence and applications are included in the file along the way. They prepare letters and general correspondence; prepare and maintain supplies in the hearing rooms; and resolve operational issues to ensure that proceedings proceed as scheduled. At the time of hearings, they complete attendance records and data entry in the system.
- Staff of the Scheduling Unit, who set the hearing schedule and liaise with the Interpreters Unit to arrange for interpreter services in the hearing room.
- Recording and interpreters' assistants, who schedule interpreters; manage accreditation testing, including foreign language and official language testing; maintain records of security clearances for interpreters to ensure they are current; and enter all interpreter timesheets into the financial system for vendor payment.[54]

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51 Ibid.

52 CIMM, Evidence, 20 March 2018, 1145 (Paul Aterman); Overall, the IRB had an approximate budget of $139 million for 2017-2018. In 2018-2019, the IRB's budget is planned for $133 million. IRB, *Written Response*, "Budget."

53 IRB, *Written Response*, Support staff, "David Tilson-2018-03-20."

54 Ibid.

## THREE INTERDEPENDANT PROCESSES: APPOINTMENTS, TRAINING, AND COMPLAINT

Throughout its study, the Committee heard how each of the appointment, training and complaint processes are fundamental to the IRB's functioning. However, witnesses often linked the three and reinforced the idea that the IRB, as an institution, must look at its culture and mechanisms to assess how to best respect the rights of vulnerable people.[55] Ideally, a well-developed appointment process and a thorough training process should minimize the number of complaints received by the IRB with respect to the conduct of its members. The following sections describe each process at the IRB and provide recommendations based on witnesses' testimony.

### A. Appointment Process

During his appearance before the Committee, Mr. Aterman underlined that the IRB has two distinct appointment regimes for its members.[56] Members of the RDP and the ID are public service (PS) employees appointed in accordance with the *Public Service Employment Act*,[57] whereas members of the RAD and IAD are appointed to the IRB by the Governor in Council (GIC).[58] GIC appointees can "hold office during good behaviour for a term not exceeding seven years and are eligible for reappointment in the same or another capacity."[59] This appointment process dates from December 2012, with the implementation of the RAD. Before December 2012, all IRB members were GIC appointees. However, GIC appointments took a significant amount of time to complete and led to a number of vacancies both at the RPD and the IAD, which contributed to a growing inventory of cases.[60] Since the implementation of the two distinct regimes for PS and GIC members, the Committee learned that the IRB currently has no vacancies for public servant positions, but that the tribunal has 12 vacancies, with the potential to add 16 additional positions.[61]

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55 CIMM, Evidence, 27 March 2018, 1210 (Preevanda Sapru); CIMM, Evidence, 19 April 2018, 1105 (Laverne Jacobs, Associate Professor and Director of Graduate Studies, Faculty of Law, University of Windsor, As an individual).

56 CIMM, Evidence, 27 February 2018, 1140 (Paul Aterman).

57 IRPA, sections 169.1(2) and 172(2).

58 IRPA, section 153(1)(a).

59 IRB, *Written Response*, "Question 5."

60 See for example, IRB, "Part III – Report on Plans and Priorities," *2009-10 Estimates*, p. 1.

61 CIMM, Evidence, 20 March 2018, 1140 (Paul Aterman).

Mr. Aterman reassured the Committee that all IRB members, whether they are hired as public servants or appointed by the GIC, "are expected to behave professionally, fairly and with integrity."[62] Most of the decisions that IRB members make "can have life-altering consequences for the people who are at the centre of those cases."[63] As such, members must be both knowledgeable and professional. Mr. Aterman emphasized that "they have to demonstrate sensitivity, empathy, stamina and self-control."[64]

The following sections describe the hiring and appointment of IRB members, including their assessment, their reappointment as well as other issues raised by witnesses with respect to the current process.

## 1. Selection of Immigration and Refugee Board Members

The appointment process for PS employees and GIC appointees is separate and distinct.

Since December 2012, public service employees of the IRB are hired under the Program and Administrative Services Group.[65] They can be hired with varying terms from casual contracts to permanent employment.

The IRB screens candidates for the public service staffing process based on required experience[66] and education.[67] Additional qualifications are also taken into consideration. If the candidate passes the screening process, she or he

> will be assessed on all the merit criteria identified in the job advertisement. The assessment can take variable forms and occur in any order: exam, interview, references, etc. To be a member the candidate must demonstrate a sufficient level of competency in the following areas: commitment to learning, effective interactive communication, cross cultural sensitivity, decision making, information seeking, judgment/reasoning skills, results orientation, self-control and values & ethics.[68]

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62 CIMM, *Evidence*, 27 February 2018, 1140 (Paul Aterman).

63 Ibid.; Sean Rehaag, *Written submission*, p. 1; Canadian Bar Association (CBA), *Written submission*, p. 2.

64 CIMM, *Evidence*, 27 February 2018, 1140 (Paul Aterman).

65 CIMM, *Evidence*, 24 April 2018, 1105 (Crystal Warner, National Executive Vice-President, Canada Employment and Immigration Union). Ms. Warner informed the Committee that public service members are hired at the PM-06 level and have work conditions determined by collective agreements.

66 CIMM, *Evidence*, 27 February 2018, 1140 (Paul Aterman).

67 IRB, *IRB Tribunal Composition, Mandates and Mode of Hire*.

68 Ibid.

In general, public servants could have a longer tenure than GICs because GICs cannot exceed a seven-year full-term appointment.[69]

A GIC appointment is made through an Order in Council by the Governor General, on the advice of the Queen's Privy Council for Canada, also known as the Cabinet. A new approach to GIC appointments was implemented in February 2016.[70] As such, GIC appointees now undergo an open, transparent and merit-based (OTMB) selection process before the selection committee can make an appointment recommendation to the Minister who brings it to the Governor in Council.[71]

The Senior Personnel Secretariat at the Privy Council Office (PCO) supports the GIC appointments process and works in close collaboration with the IRB to find the most suitable candidates to fill the tribunal's GIC positions.[72] The Secretariat at the PCO and the IRB together prepare the Notice of Appointment Opportunity, which is similar to a job advertisement, and is posted to a page on the federal government's website.[73] The selection criteria are publicly advertised in the notice of opportunity. Donnalyn McClymont, Assistant Secretary to the Cabinet, Senior Personnel Secretariat at the PCO noted that "[t]hese qualifications and criteria reflect the organization's mandate and take into account the mandate of the Minister and government priorities. Candidates are evaluated by the selection committee against these publicly available selection criteria."[74]

The selection committee is composed of the organizations responsible for making the appointment recommendation (the PCO and the IRB, in this case). Generally, the committee includes "representatives from PCO, the Prime Minister's Office, the Minister's office, and in some cases the organization, as well as the department."[75] After a review of all applications, a short list of candidates is invited for

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69 IRPA, section 153(1)(a).

70 Prior to the current Governor in Council appointment process, the IRB managed all the member selection process. Privy Council Office (PCO), *Written Response*, "Jenny Kwan-2018-03-20," p. 1.

71 CIMM, *Evidence*, 20 March 2018, 1210 (Donnalyn McClymont, Assistant Secretary to the Cabinet, Senior Personnel Secretariat, Privy Council Office).

72 Ibid., 1220.

73 In 2017-2018, the IRB spent more than $10 million for the services of the Governor in Council Secretariat. IRB, *Written Response*, "Budget."

74 CIMM, *Evidence*, 20 March 2018, 1210 (Donnalyn McClymont).

75 Ibid., 1215.

> further assessment through a written test, as is the case for administrative tribunals like the IRB, followed by interviews. Candidates considered by the selection committee to be highly qualified for appointment also undergo formal reference checks to further assess their personal suitability. The committee presents formal advice to the responsible minister on the most qualified candidates, which the minister then uses to formalize his or her recommendations to the GIC.[76]

Candidates who have successfully gone through a GIC selection process can be considered for appointment by the Minister for a two-year period. Those who are unsuccessful cannot reapply for two years. In terms of the length of term for appointment, it is ultimately the Minister who makes a recommendation to the GIC.[77]

Ms. McClymont pointed out that "people can apply all the time for positions, full-time or part-time, as GIC-appointed members at the IRB" as there is currently an ongoing intake model.[78] The PCO continues to work with the IRB to prioritize selection processes according to the tribunal's regional staffing needs.[79]

### a. Assessments

During its study, the Committee heard that IRB members, both PS employees and GIC appointees, are assessed through a written exam, an interview, a reference check and a security clearance validation.[80] The written test is five hours long.[81] However, the Committee noted that the process for assessment differs between PS employees and GIC appointees. For instance, the exams administered to both types of candidates are not exactly the same, although the competencies assessed through the exam and interview phase are similar.[82]

In a written response to the Committee, the IRB indicated that it seeks to assess nine behavioural competencies.[83] Five of those behavioural competencies are assessed during the interview stage for both PS and GIC members, which include cultural sensitivity and judgment.[84] The remaining four are assessed through exams specific to

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76 Ibid.

77 Ibid.

78 Ibid., 1220.

79 PCO, *Written Response*, "Jenny Kwan-2018-03-20," p. 2.

80 CIMM, *Evidence*, 27 February 2018, 1140 (Paul Aterman).

81 CIMM, *Evidence*, 20 March 2018, 1150 (Paul Aterman).

82 IRB, *Written response*, "CIMM-2018-04-26," p. 1.

83 Ibid.

84 CIMM, *Evidence*, 20 March 2018, 1150 (Paul Aterman).

the functions candidates would perform as RPD or ID members or as RAD or IAD members.[85] In other words, the exams measure the competencies for the position, with a particular focus on the decision-making ability. Both PS and GIC exams assess written communication and conceptual reasoning. The public service exams specifically assess judgement and decision-making as well as information-gathering competencies for potential RPD and ID members. The GIC exams specifically assess judgment and analytical thinking as well as decision-making competencies for potential RAD and IAD members.[86]

In the public service selection process, candidates who are successful on the exam advance to the next stage. Successful completion of the exam is required for each competency before a candidate can proceed to the interview. To qualify for a GIC appointment, candidates must achieve a minimum threshold on the exam. When considering candidates, the selection committee also looks at the board's regional requirements as well as needs within the RAD and IAD when determining the candidate pool for interviews.[87]

Mr. Aterman argued that it is a rigorous assessment process and, for both PS and GIC regimes, only one in 10 qualifies. From within that pool of applicants, the number of candidates who are appointed is even smaller.[88] Ms. McClymont informed the Committee that, since the OTMB process was established, 70 appointments have been made.

After they are appointed, Mr. Aterman informed the Committee that it may take up to a year for members to work "at optimal output."[89] Members' case workload per year depends on which division they are assigned to. Mr. Aterman said "a member of the IAD, fully productive, is expected to complete in the order of 150 appeals a year."[90] While the IRB looks for people who are best suited for the job of a decision-maker, Mr. Aterman recognized it is not a perfect process. However, he believes the IRB has a rigorous

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85 Although the IRB can use an exam more than once, the board does create new exams. For example, the last exam used for assessing potential ID members was created in 2016. The RPD exam used in the past several months was developed recently and is also changed periodically. The GIC exams are created every two years. IRB, *Written response*, "CIMM-2018-04-26," p. 2.

86 Ibid., p. 1.

87 Ibid.

88 CIMM, *Evidence*, 20 March 2018, 1150 (Paul Aterman).

89 CIMM, *Evidence*, 27 February 2018, 1205 (Paul Aterman).

90 Ibid., 1210.

appointment process and that the training offered to members does address potential discrepancies in decision-making.[91]

### 2. Reappointment of Immigration and Refugee Board Members

IRPA sets out that GIC appointees are eligible for reappointment at the end of their term for a maximum of seven years for a full-term appointment.

Ms. McClymont explained to the Committee that GIC members who were appointed through the OTMB selection process may be reappointed to the same position at the end of their term. Reappointment recommendations are merit-based, which are based on their performance assessment done at the IRB.[92] However, members, who were appointed prior to the process established in February 2016, have to reapply for appointment under the new OTMB process.[93] To date, Ms. McClymont stated that 18 individuals have been reappointed to GIC positions at the IRB following the new OTMB process.[94]

### 3. Issues with the Current Appointment Process

Despite the PCO's new OTMB process, some witnesses expressed concerns to the Committee about the appointment process, especially in regards in GIC appointments. Overall, witnesses advocated for a more transparent and depoliticized process that leads to a more representative board with qualified members.

With respect to PS members at the IRB, Preevanda Sapru, lawyer, criticized the board because, in her opinion, it fails "to create a transparent hiring policy."[95] Crystal Warner, National Executive Vice-President of the Canada Employment and Immigration Union, echoed the concern and suggested that all IRB members should be hired through a fair and transparent public sector process like the decision-makers currently at the RPD and ID.[96] With respect to GIC members, Prof. Ellis also called the GIC appointment and reappointment processes opaque.[97] He qualified it as such because, even after "the rigorous and much-vaunted selection process," the final appointment decision is left to

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91 CIMM, *Evidence*, 20 March 2018, 1115 (Paul Aterman).

92 Ibid.; CIMM, *Evidence*, 20 March 2018, 1235 (Donnalyn McClymont).

93 CIMM, *Evidence*, 20 March 2018, 1215 (Donnalyn McClymont).

94 PCO, ***Written Response***, "Jenny Kwan-2018-03-20," p. 2.

95 CIMM, *Evidence*, 27 March 2018, 1210 (Preevanda Sapru).

96 CIMM, *Evidence*, 24 April 2018, 1115 (Crystal Warner).

97 Ronald Ellis, *Written submission*, p. 6.

discretion of the Minister, his office or Cabinet. He believes that this has an impact on the independence of IRB members, especially if they have to go through the selection process again in order to be reappointed.[98] Prof. Ellis stated that an effective appointment process would be beneficial the IRB: "[g]etting it right in the first place ... is really the only way to protect people from bad adjudicators."[99] Mr. Boulakia reminded the Committee that, in order to attract people to become board members, the IRB needs fair and transparent processes.[100] Laverne Jacobs, Associate Professor and Director of Graduate Studies at University of Windsor, stated that "any administrative justice system should be transparent, to the extent that it can be, about its processes and about the reasoning behind its decision-making."[101]

Despite the statement from the PCO that the current GIC process is open, transparent and merit-based, another general suggestion brought to the attention of the Committee was to improve the appointments process by further depoliticizing it.[102] Sean Rehaag, Associate Professor at York University's Osgoode Hall Law School, recommended making appointments merit-based rather than based on political patronage.[103] According to his studies, he noted that "decision-making improved at the RPD when we got rid of the Governor in Council appointees. That's not because civil servants are better than Governor in Council appointees; it's because the politics was largely taken out of the RPD appointment process."[104] For that reason, he suggested giving deference to experts and according less of a role for political actors in appointment processes.[105] Mr. Boulakia suggested creating "a panel of experts who are involved in the screening process and who ultimately create a list of who is highly recommended, and the chairperson would then select from that list."[106] For Prof. Ellis, a suitable appointment and reappointment process would require the establishment of a statutory committee for GIC

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98 Ibid., p. 6.

99 Ibid., pp. 2-3.

100 CIMM, *Evidence*, 22 March 2018, 1250 (Raoul Boulakia)

101 CIMM, *Evidence*, 19 April 2018, 1105 (Laverne Jacobs).

102 CIMM, *Evidence*, 27 March 2018, 1105 (Sean Rehaag, Associate Professor, Osgoode Hall Law School, York University, As an individual); CIMM, *Evidence*, 22 March 2018, 1210 (Bashir Khan); CIMM, *Evidence*, 17 April 2018, 1135 (Cheryl Robinson, Associate Lawyer, Mamann, Sandaluk & Kingwell LLP, As an individual); CIMM, *Evidence*, 19 April 2018, 1110 (Michelle Flaherty, Professor, University of Ottawa, As an individual); CIMM, *Evidence*, 24 April 2018, 1105 (Crystal Warner).

103 CIMM, *Evidence*, 27 March 2018, 1105 (Sean Rehaag).

104 Ibid.

105 Ibid., 1235.

106 CIMM, *Evidence*, 22 March 2018, 1225 (Raoul Boulakia).

appointments. This committee, modelled after the United Kingdom's Governing Council for Administrative Justices or the Judicial Appointments Commission, should be composed of representatives from the IRB, the legal and academic communities as well as persons who could represent the public, in this case, individuals who come before the IRB.[107] In his opinion, this would ensure the independence of appointees and would depoliticize the process.

The Committee did not hear evidence which indicated that the current merit-based appointment processes for IRB members, with public service appointments to the RPD and ID and GIC appointments to the RAD and IAD, should not remain in place for the time being. Evidence, however, did suggest that they be re-evaluated once all appeal level members have been either appointed or reappointed under the new OTMB process.

In light of public concerns about the IRB appointments process over the years, both the previous Conservative government and the current Liberal government made substantial changes to the manner in which IRB members are selected and employed.

Testimony on the GIC appointment process revealed that the witnesses had not always taken the new process fully into account, nor did they appear to be fully cognizant of the significant changes made to the process in December 2017.

The Committee is reluctant to recommend changes to the new process based on testimony which may have primarily related to a prior process. However, it should be noted that the Committee agrees with the changes made by the Conservative government in 2012, which allowed the IRB to be restructured with public service adjudication at the RPD and ID level and GIC adjudication at the RAD and IAD.

The testimony with respect to GIC appointments largely failed to differentiate between concerns of partisanship, patronage and political review, as areas of concern in the appointment process. The Committee is of the view that the current GIC appointment process is sufficiently rigorous to ensure that partisanship and patronage appointments, which may diminish the competence required, have been addressed, while political oversight, which makes appointments accountable to the public, is appropriately being maintained. As such, the Committee recommends:

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107 Ronald Ellis, *Written submission*, p. 10; Ronald Ellis (2013), p. 241.

**Maintaining public service and Governor in Council appointments at the Immigration and Refugee Board of Canada**

**Recommendation 1**

**That the current Immigration and Refugee Board of Canada appointments process for the Refugee Protection Division and Immigration Division, in which merit based appointees are screened and successful applicants are hired as public servants, and for the Refugee Appeal Division and the Immigration Appeal Division, in which merit based appointments are screened and successful applicants are hired through temporary Governor in Council appointments, both be maintained, and that the Government of Canada consider reviewing both processes within three years.**

### a. Diversity in the Workforce

One of the key objectives of the OTMB process is to appoint high-quality candidates who reflect Canada's diversity.[108] As such, Ms. McClymont informed the Committee that about 60% of GIC appointees at the IRB have self-identified as women, 20% as visible minorities[109] and 5% as indigenous.[110] Michelle Flaherty, Professor at University of Ottawa's Faculty of Law, suggested that the IRB keep its current approach of hiring or appointing people with a blend of skills and experiences.[111] However, Ms. Sapru suggested that there needs to be more equal representation of different cultures at the organizational level.[112] Ms. Warner also suggested that the IRB should be more reflective of the claimants who come before it.[113]

### b. Competencies

The IRB selection process is based on behavioural competencies rather than knowledge, which was raised as an issue by some witnesses who requested that the IRB have a knowledge component in its selection process.[114] For instance, Ms. Sapru questioned

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108 CIMM, *Evidence*, 20 March 2018, 1210 (Donnalyn McClymont).

109 Ibid., 1215.

110 Ibid., 1245.

111 CIMM, *Evidence*, 19 April 2018, 1110 (Michelle Flaherty).

112 CIMM, *Evidence*, 27 March 2018, 1215 (Preevanda Sapru).

113 CIMM, *Evidence*, 24 April 2018, 1115 (Crystal Warner).

114 CIMM, *Evidence*, 22 March 2018, 1100 (Nastaran Roushan, Lawyer, As an individual); CIMM, *Evidence*, 22 March 2018, 1220 (Raoul Boulakia), CIMM, *Evidence*, 22 March 2018, 1240 (Bashir Khan, Lawyer, Refugee Law, As an individual); CIMM, *Evidence*, 22 March 2018, 1240 (Chantal Desloges, Lawyer, Desloges Law Group, As an individual); CIMM, *Evidence*, 27 March 2018, 1210 (Preevanda Sapru).

the IRB's hiring and appointment process because, in her opinion, the IRB has hired "inexperienced and sometimes incompetent board members who have no background in refugee law, which forces refugees to proceed with expensive and time-consuming appeals to the RAD and the Federal Court."[115] Nastaran Roushan, lawyer, shared the same concerns. In her opinion, IRB members are often not knowledgeable of the law, of country conditions, or even of the facts of the case before them.[116] She recommended that members be required to take a substantive test on immigration and refugee law in order to demonstrate their knowledge and expertise in the selection process.[117]

Chantal Desloges, lawyer at Desloges Law Group, recognized that in 2012 and in 2016 the IRB went from, what she termed, a patronage appointment system to a more merit-based system, which has improved the tribunal's appointments process.[118] However, in her opinion, members without the right knowledge and qualifications are still selected. She stated that she still quite regularly gets "board members in hearings who don't know basic case law from the Federal Court outlining refugee 101 principles" or "who don't follow their own guidelines and policies."[119] She emphasized the importance of substantive knowledge, but also of personal characteristics, such as patience, empathy and temperament.[120] The Canadian Bar Association (CBA) also echoes the importance of "knowledge and expertise, demeanour and attitude [as] important factors for candidacy."[121]

Other witnesses opposed the recommendation that substantive knowledge of immigration and refugee law be a condition of appointment.[122] For instance, while Prof. Ellis recognized the value of substantive knowledge, he also emphasized the importance of "judicial temperament ... and great analytical skills."[123] In addition, he explained that members of administrative tribunals need strong intellectual, analytical and personal capacities to ensure their decision-making competencies.[124] He wrote that members

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115 CIMM, *Evidence*, 27 March 2018, 1210 (Preevanda Sapru).

116 CIMM, *Evidence*, 22 March 2018, 1100 (Nastaran Roushan).

117 Ibid., 1145.

118 CIMM, *Evidence*, 22 March 2018, 12:15 (Chantal Desloges).

119 Ibid., 1240.

120 Ibid., 1215.

121 CBA, *Written submission*, p. 3.

122 CIMM, *Evidence*, 19 April 2018, 1115 (Michelle Flaherty); Ronald Ellis, *Written submission*, p. 7.

123 Ronald Ellis, *Written submission*, p. 7.

124 Ronald Ellis (2013), p. 189.

need to have a strong spirit of cooperation and to thrive in a team environment because they must see themselves, "not as individual embodiments of the tribunal, as judges are of courts, but as the tribunal's agents doing the tribunal's business."[125]

Prof. Flaherty described the ideal decision-maker as somebody, who has experience, knowledge or training in immigration and refugee matters; who has "an aptitude and experience in adjudicating fair, impartial, effective, and efficient hearings;" and who has a "cultural competency and sensitivity to the issues that are raised and dealt with by the IRB."[126] She added that the IRB should look for people who have empathy and an open mind and that are prepared to engage in training experiences so that they can broaden their experience and horizon."[127] Prof. Jacobs echoed the importance of empathy, awareness of the lived trauma of those coming before the IRB, self-reflection and transparency when it comes to decision-making.[128]

In terms of qualifications that are essential for IRB members, Mr. Brouwer recommended that potential IRB members "should be screened for their understanding of discriminatory conduct, including their understanding of appropriate behaviour in the hearing room, and conduct related to sex, race, culture, sexual orientation, gender identity and gender expression."[129] Sharalyn Jordan, Board Chair of Rainbow Refugee, echoed his recommendation by stating, "it's critical that new hires be screened for their ability to be both fair-minded and interpersonally respectful with women and LGBTQ claimants."[130] France Houle, Associate Dean of Undergraduate Studies, Faculty of Law, Université de Montréal, reminded the Committee that selection processes are often outdated and not adapted to diversity of individuals.[131]

The Committee recognizes that IRB has a high level of expertise on immigration and refugee matters. Although the Committee considers substantive knowledge on immigration and refugee law important, it also recognizes that a blend of skills and knowledge is required for the nature of IRB members' work. However, the Committee is of the opinion that the selection process can be enhanced to better assess potential

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125 Ibid., p. 201.

126 CIMM, *Evidence*, 19 April 2018, 1110 (Michelle Flaherty).

127 Ibid., 1135.

128 CIMM, *Evidence*, 19 April 2018, 1105 (Laverne Jacobs).

129 CIMM, *Evidence*, 27 March 2018, 1220 (Andrew Brouwer).

130 CIMM, *Evidence*, 27 March 2018, 1120 (Sharalyn Jordan, Board Chair, Rainbow Refugee).

131 France Houle, *Speaking Notes*, 19 April 2018, p. 6.

members. The Committee also recognizes that the IRB needs a full complement of members. As such, the Committee recommends:

**Improving the assessment process of Immigration and Refugee Board members**

**Recommendation 2**

**That the screening process for selecting all members of the Immigration and Refugee Board of Canada, either in the written aptitude exam or the interview process, include the evaluation of a candidate's awareness and understanding of discriminatory conduct and the standards of behaviour to which members of the board are to be held.**

**Appointing Governor in Council members to fill vacancies**

**Recommendation 3**

**That the Privy Council Office take all steps possible to expedite recommendations of suitable candidates to the Minister of Immigration, Refugees and Citizenship in order to fill any vacancies in Governor in Council appointees at the Immigration Appeal Division and the Refugee Appeal Division at the Immigration and Refugee Board of Canada.**

## B. Training

The IRB provides both initial training to newly appointed and newly hired members and ongoing training to members throughout their employment. Mr. Aterman asserted that all new members receive in-depth training on substantive issues and on effective communication with stakeholders before they can rule on cases.[132] He also indicated that all members regularly participate in professional development workshops to remain informed of relevant issues. Mr. Aterman informed the Committee that while training is tailored to the specificities of the four divisions of the board, common components include the respect of cultural differences and the recognition that a member's personal experience may differ from that of the person in front of them.[133] Still, witnesses voiced concern to the Committee with respect to the quality of the training of members, specifically with respect to issues related to sensitivity and vulnerable claimants. They also questioned whether the IRB's professional development initiatives are informed by, and adapted in accordance to, complaints filed against members.

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132 CIMM, *Evidence*, 27 February 2018, 1140 (Paul Aterman).

133 CIMM, *Evidence*, 20 March 2018, 1110 (Paul Aterman).

## 1. Sensitivity Training at the Immigration and Refugee Board of Canada

The current anti-harassment, gender and sexuality sensitivity training at the IRB includes initial training to prepare members to hear cases, training related to the *Code of Conduct for Members of the Immigration and Refugee Board of Canada* (Code of Conduct),[134] training regarding the various Chairperson's Guidelines, and updates related to emerging legal matters.

### a. Training for all Immigration and Refugee Board Members

According to a written submission provided to the Committee from the IRB,[135] all members and employees must complete:

- The IRB's *Creating a Respectful and Harassment Free Workplace* course;
- The IRB's *Values and Ethics* course;
- Training related to the Chairperson's Guideline 9 on Sexual Orientation, Gender Identity and Expression (SOGIE);[136] and
- Training with respect to the Code of Conduct.

The course entitled *Creating a Respectful and Harassment Free Workplace* addresses appropriate workplace behaviour, as well as roles and responsibilities of employees in creating a respectful workplace. It includes instruction on mitigating risks of generating conflict and suggests ways of resolving contentious workplace issues. The *Values and Ethics* course addresses employee obligations under the *Values and Ethics Code for the Public Service*. The course, among other things, raises awareness of relevant policies and legislation in the public service, public servants' responsibilities related to values and ethics, and addresses ethical dilemmas, conflicts of interest, harassment, issues with post-employment, political activities, or situations of wrongdoing.[137]

During the spring and summer of 2017, the SOGIE Guideline training reviewed the legal components and application of the Guideline, its contextual background, and how to

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134 IRB, Code of Conduct for Members of the Immigration and Refugee Board (**Code of Conduct**).

135 IRB, ***Written Response***, **"Larry Maguire-2-2018-02-27."**

136 *Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression*, **issued pursuant to paragraph 159(1)(h) of the *Immigration and Refugee Protection Act*, effective May 1, 2017.**

137 IRB, ***Written Response***, **"Larry Maguire-2-2018-02-27," p. 1.**

incorporate a trauma-informed approach to questioning.[138] Mr. Aterman specified that the IRB provided two separate half-day sessions, the first dealing with the legal component and the second with "the practical skills of questioning and how you deal with people in certain situations."[139]

Finally, all members of the IRB received Code of Conduct training as part of their new member training. This training includes a review of their obligations under the Code, practical case studies and scenario-based exercises.[140]

### b. Training Specific to Each Division

#### (i) Training at the Refugee Protection Division

Specific gender and sexuality sensitivity training is provided for new RPD members (as redesigned in 2016). In a written submission, the IRB noted that gender and sexuality sensitivity are considered fundamental and are "repeatedly discussed, considered and evaluated over the following weeks of training."[141]

The RPD New Member Training Program includes:

- A cultural sensitivity training session entitled *Cross Cultural Questioning*;
- Training on Guideline 4 (*Women Refugee Claimants Fearing Gender-Related Persecution*);
- Training on Guideline 8 (Vulnerable Persons); and
- Further training on Guideline 9 (SOGIE awareness).

The IRB explained that all sessions are delivered at the beginning of an eight-day training period that focuses upon presiding in a hearing room and questioning claimants. Members practice questioning in mock hearing rooms where trainers monitor for sensitivity awareness of SOGIE and cultural awareness issues. During subsequent training on decision writing, new members write practice decisions relating to sexual orientation, which are reviewed by trainers verifying for the use of appropriate language and the avoidance of stereotypes, among other things.

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138 Ibid., p. 2.

139 CIMM, *Evidence*, 20 March 2018, 1110 (Paul Aterman).

140 IRB, *Written Response*, "Larry Maguire-2-2018-02-27," p. 2.

141 Ibid.

New members are monitored and evaluated during the training period and during their first year as a member. The evaluations "include an assessment of their awareness and sensitivity relating to both cultural and SOGIE issues."[142]

In addition to the all-division training on SOGIE listed above, existing members of the RPD received a training session on the SOGIE Guidelines as part of the curriculum for all members designated to the Legacy Task Force. Professional development workshops on issues related to adjudicating claims based on "sexual orientation, vulnerable persons, etc."[143] are also provided to existing members. Examples of professional development days at the IRB in 2017 include training on the SOGIE Guidelines, refugee mental health, post-traumatic stress disorder, memory and psychology, and interpretation and analysis of psychological/psychiatric reports for claimants and their preparation.[144]

Finally, the IRB noted that members are continuously updated with respect to Federal Court jurisprudence, including decisions relating to cultural sensitivity, sexual orientation, or the application of the various Guidelines.[145]

### (ii) Training at the Refugee Appeal Division

In its written submission, the IRB indicated that training for new RAD members consists of a condensed version of the RPD new member training and noted that gender and SOGIE training is integral to training for new RAD members. The IRB specified that new members receive instructions regarding all of the Chairperson's Guidelines, the principles of natural justice, ethics, and the Code of Conduct. New members are also required to complete pre-course work and attend an hour-long discussion on "cultural competence."[146] Finally, the IRB noted that RAD offers practical training, with mock hearings and written assignments.

In its written submission, the IRB noted that the period of formal training can last up to three months but varies depending on the division and the experience of the newly appointed member. The IRB provided an example of a training schedule for a RAD appointee with no experience in the refugee determination system.[147] The schedule

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142 Ibid.

143 Ibid., p. 3.

144 Ibid.

145 Ibid., p. 2.

146 "Cultural competence" is understood to refer to a set of attitudes, behaviours and skills than enable an individual to succeed in a cross-cultural setting.

147 IRB, *Written Response*, "Jenny Kwan-4-2018-02-27."

indicated that training on refugee protection determination takes three and a half weeks. Another three and a half weeks are allotted to training on refugee appeals. Finally, observations of hearings occur over a period of two weeks. In total, the typical training period for a new RAD appointee is nine weeks.[148]

The RAD runs refresher training and holds "regular member discussions" on the Chairperson's Guidelines and on cultural sensitivity. The division "also develops individualized learning plans for members that may include additional training on many areas, including SOGIE."[149] Finally, in addition to the SOGIE training given to all members indicated above "the RAD is planning a member-only discussion on appeals based on sexual orientation following on the first year existence of the SOGIE guidelines."[150]

#### (iii) Training at the Immigration Appeal Division

As of October 2016, "cultural competence content" has been included in new member training at the IAD. As for RAD members, new members at the IAD must complete pre-course work and attend an hour-long discussion on "cultural competence." Two case studies in *Conduct of a Proactive Hearing* discussing issues related to cultural competence are also reviewed.

Finally, IAD members have annual SOGIE refreshers and members have monthly professional development sessions where they receive updates on decisions from the Federal Court.[151]

### 2. Concerns Regarding Current Training

The Committee heard from various witnesses who voiced concern about different aspects of the training provided to members. Ms. Desloges noted that a lack of transparency about what training is received complicates the matter, making it difficult for stakeholders to provide suggestions.[152] The need for increased transparency with respect to the training offered was also noted in a written submission from the Canadian Bar Association.[153] Cheryl Robinson, Associate Lawyer, Mamann, Sandaluk & Kingwell

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148 In correspondence to the Committee, the IRB indicated that the salary cost for training 26 new RAD members and trainers is approximately $800,000; Ibid.

149 IRB, *Written Response*, "Larry Maguire-2-2018-02-27," p. 5.

150 Ibid.

151 IRB, *Written Response*, "Larry Maguire-2-2018-02-27," p. 5.

152 CIMM, *Evidence*, 22 March 2018, 1240 (Chantal Desloges).

153 CBA, *Written submission*, p. 3.

LLP, added that inconsistent approaches among members points to an inadequacy of training as does the persistence of "negative approaches" by members despite "whatever training is present."[154] When asked whether, in general terms, members had appropriate training to do their jobs, Ms. Roushan replied, "I would say absolutely not."[155] Ms. Roushan highlighted as an example the failure of a member to understand the impact of violence on a claimant, showing a lack of understanding of the IRB's gender guidelines.[156] Specific training-related aspects discussed surrounded a perceived need to extend periods of sensitivity-based training, a need for trauma-informed training, a need for follow-up training and testing, and a need to include individuals who have gone through claim hearings in the training of members.

### a. Improvements to Sensitivity Training

Several witnesses applauded the introduction of the 2017 SOGIE Guidelines, noting that their initial impact has been promising.[157] Still, stakeholders maintain that there are areas in which improvements can be made.[158] Common observations from witnesses included that sensitivity training should occur over a longer period, should incorporate individuals that have been through hearings, and should include case study components.

In its written submission to the Committee, the Canadian HIV/AIDS Legal Network recommended that member training for LGBTQ sensitivity take place over multiple days and that it involve members from refugee source countries.[159] Maurice Tomlinson, Senior Policy Analyst, Canadian HIV/AIDS Legal Network, explained that the first day of training should consist of a discussion of theory with a second day including case studies and "persons from the affected communities there to interact with the IRB members who are being trained."[160] Mr. Tomlinson related his experience of providing sensitivity training to indicate that, in his opinion, the "cultural shift" required during sensitivity

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154 CIMM, *Evidence*, 17 April 2018, 1115 (Cheryl Robinson).

155 CIMM, *Evidence*, 22 March 2018, 1125 (Nastaran Roushan).

156 Ibid.

157 For example, CIMM, *Evidence*, 27 March 2018, 1120 (Sharalyn Jordan); CIMM, *Evidence*, 27 March 2018, 1225 (Michael Tutthill, Executive Director, Rainbow Resource Centre).

158 For example, CIMM, *Evidence*, 27 March 2018, 1110 (Mr. Kimahli Powell, Executive Director, Rainbow Railroad); CIMM, *Evidence*, 27 March 2018, 1210 (Preevanda Sapru); Canadian HIV/AIDS Legal Network, *Written submission*, p. 6.

159 Canadian HIV/AIDS Legal Network, *Written submission*, p. 7.

160 CIMM, *Evidence*, 27 March 2018, 1245 (Maurice Tomlinson, Senior Policy Analyst, Canadian HIV/AIDS Legal Network).

training "can't happen in three hours."[161] Kimahli Powell, Executive Director, Rainbow Railroad, argued that Section 3[162] of the SOGIE Guidelines alone requires in-depth review and that short training periods do not provide enough time for members to adequately "dive into that section of the guidelines."[163] Michael Tutthill, Executive Director, Rainbow Resource Centre, explained that while Guideline 9 provides a foundation to understand SOGIE issues, ongoing training on the topic is necessary.[164] Mr. Brouwer added that partnering with academics for ongoing training should be explored, especially considering that academics such as those at CARL with expertise in refugee law would be pleased to help develop protocol.[165]

Finally, Prof. Jordan, one of the individuals who designed and delivered the sensitivity training for the IRB, remarked that she had requested a longer training period and observed that "[t]hree hours is clearly not enough."[166] In a similar vein to Mr. Tomlinson, she stated that short training periods insufficiently address the necessary shift in attitude or values and that achieving this requires "far more sustained training."[167] Prof. Jordan suggested that she would like to see "far more participatory elements that would give board members an opportunity to practise formulating questions and conducting an analysis and getting immediate feedback."[168] She added that once members had the opportunity to use and understand the initial concepts, video-recorded practice sessions with immediate feedback on how they are asking questions or conducting an analysis would be useful.[169] Consistent with Prof. Jordan's view, Ms. Robinson noted that training elements related to trauma have to be applied through "situational-based training, running through scenarios and case studies. It's not enough to simply have someone lecture at you, and then put you into a hearing. That training cannot happen on the job."[170]

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161 Ibid., 1230.

162 IRB, ***Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression***, **section 3,** Understanding the challenges faced by individuals with diverse SOGIE in establishing their SOGIE.

163 CIMM, *Evidence*, 27 March 2018, 1250 (Mr. Kimahli Powell).

164 CIMM, *Evidence*, 27 March 2018, 1225 (Michael Tutthill).

165 CIMM, *Evidence*, 27 March 2018, 1220 (Andrew Brouwer).

166 CIMM, *Evidence*, 27 March 2018, 1230 (Sharalyn Jordan).

167 Ibid.

168 Ibid.

169 Ibid., 1245.

170 CIMM, *Evidence*, 17 April 2018, 1120 (Cheryl Robinson).

Ms. Robinson added that training should include "those who have gone through the refugee [determination] process as well as the agencies that work with these communities." She proposed that this could be done by way of recording or with the help of the respective agencies.[171] barbara findlay, lawyer, concurred, stating that whether by means of an advisory committee or video vignettes, training should include the perspective of potential claimants.[172] According to Ms. findlay, the assistance of refugee claimants or their representative to provide advice for training would be helpful as one "can't necessarily know what counts as offensive or demeaning."[173] The CBA also highlighted the importance of including "first-hand, narrative-based accounts of refugee experiences".[174]

Prof. Houle indicated that, while the approach may have changed, when she worked as legal advisor at the IRB, training was provided through lectures and was heavily weighted towards legal aspects. She argued that the approach was difficult for members without a legal background, to the point of being incomprehensible. Prof. Houle recommended that training should consist of a mixture of case studies, lectures and self-awareness including reflexivity.[175] Prof. Houle also highlighted the importance of experiential learning, defining the process as testing one's knowledge through case studies, observing and evaluating the learning experience, and subsequently re-evaluating one's position after undergoing training.[176]

### b. Trauma-informed Training

Witnesses alluded to the need for member training to be trauma-informed and for attention to be paid to the manner in which hearings can lead to re-traumatization of vulnerable claimants. Ms. Robinson warned of the potential for hearings before the RPD to re-traumatize claimants. She explained that intrusive questions related to a decision-maker's determination of credibility of the claimant often re-traumatize witnesses, inhibiting their ability to answer questions rather than actually drawing out useful testimony.[177] Prof. Jacobs included decision-maker awareness of the impact of trauma

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171 Ibid., 1115.

172 CIMM, *Evidence*, 17 April 2018, 1255 (barbara findlay, Lawyer, As an individual).

173 Ibid.

174 CBA, *Written submission*, p. 4.

175 The term reflexivity in the sense of adjudication includes the consideration of the implications of one's background, culture, experience, biases, and assumptions.

176 France Houle, *Speaking Notes*, 19 April 2018, p. 6.

177 CIMM, *Evidence*, 17 April 2018, 1115 (Cheryl Robinson).

and avoidance of re-traumatization of those before them as one of four crucial elements for the proper functioning of administrative justice.[178] Mr. Tutthill added that avoiding the re-traumatization of victims needed to be addressed for all individuals appearing before the IRB and not only for SOGIE claimants.[179] He further stated that it is important for decision-makers to understand that the Chairperson's Guidelines on SOGIE claimants, on gender-related persecution and on vulnerable persons "are interrelated and may all apply to an individual case."[180] The CBA added where the nature or extent of an individual's trauma history is not clear, general guidelines setting out standards for trauma-informed questioning would be valuable. Such guidelines, the CBA argued, "may help Members better understand which specific Guideline(s) to apply."[181]

According to Ms. Robinson, mental health professionals could play a role in training by providing members with a better understanding of the impact of trauma on an individual's testimony, on their ability to recall memories and on their ability to verbalize traumatic events. Ms. Robinson specified that such training should also include instruction on how to read and apply psychological reports given understanding and applying such reports remains a "stumbling block" in refugee determination.[182] She further explained that evidence in psychological reports receives variable responses from board members and that learning how to read reports, the impact they might have or how the contents apply to an individual claim would be helpful.[183]

### c. Training on Credibility and Credibility Guidelines

Certain witnesses highlighted the need for better training with respect to the adjudication of credibility. Prof. Houle said the guide produced by the IRB and used by members in matters of credibility assessments, entitled *Assessment of Credibility in Claims for Refugee Protection,*[184] is more than 100 pages long. She argued the document is often used by individuals with no legal background and is beyond understanding for most non-lawyers. She noted if the IRB training on credibility were as complicated as the guide it would be understandable that members would have difficulty mastering

178 CIMM, *Evidence*, 19 April 2018, 1105 (Laverne Jacobs).

179 CIMM, *Evidence*, 27 March 2018, 1250 (Michael Tutthill).

180 Ibid., 1225.

181 CBA, *Written submission*, p. 3.

182 CIMM, *Evidence*, 17 April 2018, 1120 (Cheryl Robinson).

183 Ibid., 1200.

184 IRB, *Assessment of Credibility in Claims for Refugee Protection*.

credibility determinations for refugee claims.[185] Prof. Rehaag argued that there is an urgent need for training and for guidelines with respect to credibility assessments in order to correct "massive variations" in decision making.[186] In a written submission to the Committee, Prof. Rehaag maintained that not only are credibility assessments the main cause of these variations, they "are also the aspect of refugee adjudication that is most difficult to correct through oversight processes, both at the RAD and in Federal Court, because of deference generally shown to first instance decision-makers in this area."[187] Prof. Rehaag warned that credibility assessments in refugee determination are incredibly difficult and decision-makers should be encouraged to approach such assessments with increased diligence.[188] He added that individuals tend to "overestimate their ability to detect whether people are telling the truth" and recommended that instructions be given to decision-makers to give claimants the benefit of the doubt during hearings.[189] In harmony with Prof. Rehaag's view, Prof. Jacobs stated that IRB members need to have "ongoing training on ways of assessing credibility and avoiding implicit bias." Prof. Jacobs warned that in doing so, it would be "important to refrain from pressuring individuals to decide in certain ways" as this would violate the independence of adjudicators.[190] Prof. Jacobs suggested that the results of conduct complaints could be made anonymous and used as training tools for the board as a whole.[191] Furthermore, Ms. Robinson and Ms. findlay warned that the passage of time due to backlogs at the IRB risks compounding the complexity of certain cases. Ms. Robinson recounted the case of a board member who questioned the consistency of an individual who was comfortable expressing his sexual orientation during his hearing at the board yet not when he first arrived in Canada a year and a half earlier.[192] Ms. findlay added that "sometimes people who come here don't even have a self-concept as being queer—any flavour of queer—because there are no social mirrors reflecting that as an option in their countries of origin. They come to a sense of themselves as gay, lesbian, or transgender once they get here."[193] Ms. Robinson added

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185 France Houle, *Speaking Notes*, 19 April 2018, p. 6.

186 CIMM, *Evidence*, 27 March 2018, 1235 (Sean Rehaag).

187 Sean Rehaag, *Written submission*, p. 6.

188 Prof. Rehaag submitted that the question decision-makers should pose is not "Do I believe the claimant?" but rather "Could any of my colleagues reasonably believe the claimant?" In the affirmative, according to Prof. Rehaag, claimants should be believed. CIMM, *Evidence*, 27 March 2018, 1105 (Sean Rehaag).

189 CIMM, *Evidence*, 27 March 2018, 1105 (Sean Rehaag).

190 CIMM, *Evidence*, 19 April 2018, 1105 (Laverne Jacobs).

191 Ibid.

192 CIMM, *Evidence*, 17 April 2018, 1135 (Cheryl Robinson).

193 CIMM, *Evidence*, 17 April 2018, 1255 (barbara findlay).

that in gender-based violence claims, the passage of time increases the difficulty of proving evidence to the board.[194]

Prof. Flaherty also stressed training is an important part of addressing the issue of adjudication of credibility. She said "there is an existing legal test, and there is a rich body of jurisprudence that courts and all the administrative tribunals across the country use in assessing credibility."[195] Prof. Flaherty submitted that, instead of altering the legal principles related to credibility, attention should be paid to ensuring the existence of merit-based appointment processes to decrease the chances that members assess credibility on ideological or political grounds. She nevertheless suggested the IRB continue training on how to apply the legal principles related to credibility, "the relevant and irrelevant factors, the aspects to which they need to be culturally sensitive, and the manner in which they can and ought to express their credibility findings in ways that are both intelligible and transparent."[196]

However, while advocating for the creation of guidelines on credibility, Prof. Rehaag maintained that the focus should not be on current case law. He explained that "the guideline should not aim to provide a recipe for how to make credibility assessments that will be upheld by the RAD and the Federal Court. Rather, the aim should be to improve decision-making."[197] In advocating for a combination of credibility guidelines and training, Prof. Rehaag suggested that guidelines could inform and remind members that:

- Credibility assessments are not only about the facts of the case but also about the experiences, identities, and predilections of decision-makers;
- Credibility assessments are unreliable, especially in the case of refugee claims due to "communication across cultures, communication through interpreters, communication with people suffering from mental health challenges related to trauma, communication with people who are stressed, etc;"[198] and

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194 CIMM, *Evidence*, 17 April 2018, 1135 (Cheryl Robinson).

195 CIMM, *Evidence*, 19 April 2018, 1110 (Michelle Flaherty).

196 Ibid.

197 Sean Rehaag, *Written submission*, p. 6.

198 Ibid.

- Considering the unreliability and subjectivity of credibility assessments and considering the stakes involved in refugee adjudication, negative credibility assessments should be considered with caution.[199]

In a similar vein to participatory training and case-study scenarios discussed in the section above regarding sensitivity training, Prof. Rehaag indicated credibility training should include an experiential learning component. Prof. Rehaag argued "decision-makers should participate in experiments that highlight ways in which their credibility assessments are unreliable and often based on unconscious and arbitrary factors."[200]

Finally, Ms. findlay suggested member training should include instruction on methods of asking questions. In putting the challenge of decision-makers into perspective, Ms. findlay explained that members "have to ask extremely sensitive questions and evaluate the answers for credibility [while knowing] that the person may have had to lie to keep alive for all of their lives. It's not an easy thing, so [training] in that particular area of how to ask those questions [is necessary]."[201]

The Committee acknowledges the initial impact of the SOGIE Guidelines and that their associated training has been positive. However, the Committee also acknowledges that in order to provide more comprehensive effect, sensitivity training must occur over a longer period of time and include scenario-based training. The Committee acknowledges the importance of trauma-informed training. Finally, the Committee recognizes the challenges of assessing credibility and acknowledges that hearing delays add to the challenges. The Committee further recognizes the difficulties of correcting such assessments through the oversight processes. The Committee recommends:

**Improving training at the Immigration and Refugee Board of Canada**

**Recommendation 4**

**That the Immigration and Refugee Board of Canada commit to a process for continuous improvement in member education, and, specifically, demonstrate improvement in member education in the areas of (a) sensitivity training, (b) trauma-informed investigation techniques and (c) credibility assessment; and that the Immigration and Refugee Board of Canada review, on a periodic basis, the effectiveness of the board's**

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199 Ibid.

200 Ibid.

201 CIMM, *Evidence*, 17 April 2018, 1255 (barbara findlay).

**training guidelines, including the Sexual Orientation Gender Identity Expression Guideline, as education and training tools.**

**Ensuring a mandatory continuing professional development for members**

**Recommendation 5**

**That the Immigration and Refugee Board of Canada institute a more rigorous policy of mandatory continuing professional development for members so that they remain informed of best practices and standards in each area of required competency, including relevant legislation, judicial decisions and procedural fairness; and that an evaluation of members' comprehension and application of this learning play a significant part in their yearly review, with individual programs developed for members requiring additional training or mentorship, additionally, that all guidelines and training tools be continually revised and improved to ensure continuous improvement.**

### d. Follow-up Training and Complaint-informed Training

The importance of ongoing training and was raised by several witnesses within various contexts. With respect to follow-up sessions after initial training, Ms. Robinson emphasized the need for board members to reconvene after having had the opportunity to apply training in practice in order to discuss its implementation, as well as for areas members might be struggling with. Ms. Robinson said this would also be "an ideal time for those board members to listen to their own past hearing recordings to objectively hear for themselves how they dealt with a difficult line of questioning or a case." She noted "[f]eedback on the application of the training would allow those board members to really hone and develop their skills and training."[202] Mr. Tomlinson observed claimants or their counsel should have an opportunity to provide post-hearing feedback that can be used to improve members' questioning while not adversely affecting their claims.[203]

Mr. Aterman indicated that there have been occasions when comments provided to the IRB were incorporated into the training given to members. He noted recommendations provided by the recent external review of the RAD were integrated into training given on how to write reasons provided by members. Mr. Aterman said that "training subsequent to [the external review] has been focusing on simplifying the way the reasons are written. That's a concrete example of where that feedback loop actually operates."[204]

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202 CIMM, *Evidence*, 17 April 2018, 1120 (Cheryl Robinson).

203 CIMM, *Evidence*, 27 March 2018, 1115 (Maurice Tomlinson).

204 CIMM, *Evidence*, 27 February 2018, 1240 (Paul Aterman).

### e. Assessing Members on Training Received

Certain witnesses advocated for assessments to be performed to evaluate whether members who had received training as a result of a complaint against them had properly assimilated the training they subsequently received. Ms. Robinson warned that in the absence of an evaluation after such training, the subsequent claimants in front of the same decision-maker could find themselves at the mercy of whether or not the training was effective. She added, as an example, that other professional bodies have incorporated "a feedback mechanism" in which people are only reinstated to their profession without supervision or follow-up."[205] Finally, Ms. findlay added that structured follow-up and evaluation was necessary, consisting of an exam or evaluation at the end of training.[206]

Mr. Aterman pointed out that the member's annual performance appraisal provided the occasion whereby assessments could be made. He explained a member's manager would have been aware of the training required after a complaint and should assess whether or not the training was effective.[207]

### f. Need for Mentors

Ms. Warner oversees representation and labour relations for the majority of the unionized decision-makers at the IRB. She stated that, from her experience working for the board and upon speaking to members, ample training is being provided to decision-makers.[208] However, Ms. Warner stated the union has had ongoing discussions with the IRB about the need for ongoing mentoring. Ms. Warner elaborated that being accompanied to a hearing "once or twice and being shadowed once or twice is not enough."[209] She said members have indicated it takes more than six months to feel confident in the hearing room and that there "needs to be longer-term mentorship."[210] The CBA also recommend that new members shadow more senior members until they are equipped to hear cases alone.[211] Finally, Ms. Warner further argued that in the case of longer-serving employees, receiving mentorship from "newer employees might

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205 CIMM, *Evidence*, 17 April 2018, 1140 (Cheryl Robinson).

206 CIMM, *Evidence*, 17 April 2018, 1140 (barbara findlay).

207 CIMM, *Evidence*, 27 February 2018, 1245 (Paul Aterman).

208 CIMM, *Evidence*, 24 April 2018, 1105 (Crystal Warner).

209 Ibid., 1125.

210 Ibid.

211 CBA, *Written submission*, p. 4.

address some of the concerns that our other witness is speaking to with regard to the entrenched ideas."[212]

## C. Complaint Procedure

The IRB has a procedure in which any person[213] may file a complaint against an IRB member about conduct that is believed to be contrary to the IRB Code of Conduct. From December 2012 to December 2017, the IRB applied the Protocol Addressing Member Conduct Issues,[214] a decentralized process that delegated the management of complaints to regional managers with multiple levels of review. However, on 21 December 2017, the IRB issued new Procedures for Making a Complaint about a Member,[215] centralizing the complaints process within the IRB's Office of Integrity.[216] A full review of the new process will occur one year after its implementation. The following section provides an outline of the contents of the Code of Conduct and the Protocol as well as of the previous and current complaints processes before addressing comments from witnesses.

### 1. *Code of Conduct for Members of the Immigration and Refugee Board of Canada*

Prof. Jacobs informed the Committee that codes of conduct are relatively new in administrative law and where implemented in Canada, few have a complaints process attached – the exception being the Conseil de la justice administrative in Quebec. Prof. Jacobs noted, "[i]n a sense, the IRB should be commended for having set itself into a new field of creating a complaints process."[217]

All full-time and part-time members of the IRB, regardless of their division or whether they are public servants appointed under the *Public Service Employment Act* or GIC appointees, are subject to the Code of Conduct. The Code of Conduct establishes the standards of behaviour that govern the professional and ethical responsibilities of IRB members.[218] Its scope is self-defined as encompassing the need to conserve and

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212 CIMM, *Evidence*, 24 April 2018, 1125 (Crystal Warner).

213 IRB, Procedures for Making a Complaint about a Member, section 3.2 "A complaint may be made by any individual, including: counsel, any party to IRB proceedings, IRB personnel, an organization, or the public."

214 IRB, Protocol Addressing Member Conduct Issues.

215 IRB, Procedures for Making a Complaint about a Member.

216 IRB, IRB's Office of Integrity.

217 CIMM, *Evidence*, 24 April 2018, 1110 (Laverne Jacobs).

218 IRB, *Code of Conduct*, section 1.

enhance the public confidence in the "integrity, objectivity and impartiality" of the IRB and the independence of decision-making.[219] The Code contains three primary responsibility groups, namely members' responsibilities towards the tribunal, towards the parties involved in hearings and towards the public. Responsibilities towards parties before the board include but are not limited to:

- Conducting hearings in a courteous and respectful manner;
- Ensuring that the proceedings are fair, orderly and efficient;
- Exercising duties without discrimination;
- Taking into account the social and cultural differences of participants and respecting their human rights;
- Complying with all procedural fairness and natural justice requirements;
- Ensuring decisions are free from the improper influence from others; and
- Rendering reasons in accordance with any standards that may be established by the IRB regarding quality decision-making and timeliness.

In written correspondence provided to the Committee, the IRB indicated that complaints can be challenging to classify and often touch on more than one ground. Nevertheless, approximately three-quarters of complaints received since 2009 relate to the grounds of "courtesy and respect" and "fairness and natural justice."[220]

### 2. Decision and Complaint Statistics

Mr. Aterman informed the committee that in 2017, 224 members belonging to the four divisions of the IRB made a total of 43,153 decisions.[221] He noted that since 2009, "there have been approximately 490 members who have worked or are working at the board as decision-makers and since 2009 they have made a total of 425,144 decisions."[222] During

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219 Ibid., section 5.

220 IRB, *Written Response*, "Jenny Kwan-7-2018-02-27."

221 CIMM, *Evidence*, 27 February 2018, 1140 (Paul Aterman).

222 CIMM, *Evidence*, 20 March 2018, 1105 (Paul Aterman).

that period, the IRB received 170 complaints. He added that of these, 21 were considered founded and pertained to 14 members.[223]

Table 1 - Annual Complaints Against Members Since 2009

| Year | Founded | Unfounded | Out of scope | Closed | Pending | Outcome not recorded | Total |
|---|---|---|---|---|---|---|---|
| 2009 | 2 | 7 | 5 | 0 | 0 | 0 | 14 |
| 2010 | 3 | 21 | 13 | 0 | 0 | 1 | 38 |
| 2011 | 5 | 18 | 6 | 0 | 0 | 0 | 29 |
| 2012 | 0 | 8 | 6 | 0 | 0 | 3 | 17 |
| 2013 | 3 | 5 | 6 | 0 | 0 | 0 | 14 |
| 2014 | 2 | 10 | 7 | 0 | 0 | 0 | 19 |
| 2015 | 2 | 6 | 3 | 0 | 0 | 0 | 11 |
| 2016 | 0 | 7 | 2 | 1 | 1 | 1 | 12 |
| 2017 | 3 | 3 | 0 | 0 | 5 | 1 | 12 |

Note: The table was created using correspondence to the Committee from the IRB.[224]

Although the numbers provided by Mr. Aterman and the IRB show a low ratio of complaints to number of decisions made, Asiya Jennifer Hirji, lawyer, warned that the current complaint system is too dependent on members of the immigration bar making complaints. Ms. Hirji indicated she suspects complaints are not being filed by self-represented litigants. She further explained that these potentially vulnerable individuals "are not aware they have recourse and they are certainly not exercising that recourse." She also noted "[m]any members of the bar are not filing complaints and are [also] not necessarily aware of the process."[225]

### 3. Protocol Addressing Member Conduct Issues (December 2012 – December 2017)

As indicated above, the complaints against decision-makers under the *Protocol Addressing Member Conduct Issues*[226] were received and initially disposed of by the regional manager of the member concerned. The respective manager would assess the complaint, conduct an investigation and make a determination. If a complainant disagreed with an outcome, he or she could request a review by the Deputy Chairperson. If dissatisfied with the Deputy Chairperson's decision, a request for review

223 Ibid.

224 IRB, *Written Response*, "Jenny Kwan-6-2018-02-27."

225 CIMM, *Evidence*, 22 March 2018, 1135 (Asiya Jennifer Hirji, Barrister and Solicitor, As an individual).

226 IRB, *Protocol Addressing Member Conduct Issues*.

by the Chairperson could be made. In commenting on the procedure, Mr. Aterman explained that "[i]t was a very layered process. It was diffuse in the sense that there was inconsistency between regions in the way that the complaints were managed."[227] Mr. Aterman indicated that, for this complaints procedure, the individual responsible for investigating the complaint "was a little too close to the person being investigated."[228] He also noted stakeholders had criticized the process, alleging it lacked transparency, was too complicated, was difficult to access and failed to provide enough oversight.[229] Finally, in correspondence to the Committee, Mr. Aterman acknowledged that the information revealed during the Committee's study showed the need for, and justified, the recent reforms.[230]

### 4. Review of Complaint Procedure and Consultation Process

In 2016, the IRB Chairperson decided to review the complaints procedure and in 2017 the IRB sought the input of stakeholders. In a letter to the Committee, the IRB listed the stakeholders involved in the consultation process:

- Canadian Council for Refugees (CCR);
- Canadian Association of Professional Immigration Consultants (CAPIC);
- Canadian Association of Refugee Lawyers (CARL);
- Canadian Bar Association (CBA);
- Quebec Immigration Lawyers Association (AQAADI);
- Refugee Lawyers Association (RLA);
- UN Refugee Agency in Canada (UNHCR Canada); and
- Legal Aid Ontario.[231]

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227 CIMM, *Evidence*, 27 February 2018, 1155 (Paul Aterman).

228 Ibid.

229 Ibid., 1145.

230 IRB, *Letter*, 13 April 2018, p. 2.

231 IRB, *Written Response*, "Jenny Kwan-8-2018-02-27."

The IRB indicated that recommendations from stakeholders for the new IRB *Procedures for Making a Complaint about a Member*[232] include:[233]

1. Informal resolution of claims only occurs through the Director of the Office of Integrity, where appropriate, and to the satisfaction of both parties.

2. Cases that are resolved informally are still included in the annual report. In addition to the outcome of a complaint, the nature of the complaint and the steps taken to address the complaint are included in the annual report.

3. When a complaint is received, the IRB's Office of Integrity sends an acknowledgement of receipt to the complainant. The complainant, the member who is the subject of the complaint and the member's managers are kept informed about the complaints process, as appropriate.

4. When determining how to proceed with a complaint, the Chairperson takes into account incidents of prior misconduct, the gravity of the conduct, or/and other factors and circumstances.

5. The new Procedures are written in plain language and are accessible from several access points on the IRB's website.

6. The Procedures now state that the IRB will make best efforts to accommodate the particular needs of vulnerable persons who make complaints where those needs are made known to the IRB.

Other recommendations from stakeholders were not included:[234]

1. The IRB did not adapt the complaints procedure to reflect the stakeholder request for external experts, including former judges, to make recommendations to the board upon completion of the investigation of all complaints against members.

2. The IRB did not implement a process for external experts to regularly review complaints in order to identify common causes. However, the IRB

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232 IRB, *Procedures for Making a Complaint about a Member*.

233 IRB, *Written Response*, "Jenny Kwan-8-2018-02-27."

234 Ibid.

noted that since under the new process all complaints are administered by the Office of Integrity, the board will be able to identify and address common causes of complaints.

3. The IRB indicated that a timeline for the complaints process was not included in the new procedure because "it would be difficult to establish a service standard." However, the IRB noted that after the review of the new complaints process, a timeline may be easier to define.

4. The IRB explained that the *Privacy Act* prohibited the sharing of personal information of members and complainants with third parties. Because of this, the IRB cannot inform counsel of a complainant of other lawyers who have made complaints against a same member.

5. The IRB did not adopt the stakeholder suggestion that where a lawyer submits a complaint against a member, the IRB ensure that the member is not assigned to further hearings with that lawyer. The IRB explained that, in order to avoid the use of a complaint as a tool to select preferred members, the existence of a complaint cannot be a factor in assigning a member to a case.

6. The IRB indicated that, as a general rule, complaints in ongoing proceeding would continue to be addressed only once a case is finalized and that the complaints process could not be used to remove members from hearing ongoing cases. However, the IRB explained that the new procedures allow the Chairperson, in exceptional circumstances, to decide that a complaint be dealt with before the proceedings are concluded.

### 5. Procedures for Making a Complaint about a Member as of 21 December 2017

The current complaint review process can be viewed in full on the IRB website under the *Procedures for Making a Complaint about a Member* section.[235] The following provides a condensed view of the process outlined in sections 5 through 9 of the Procedures:

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235 IRB, *Procedures for Making a Complaint about a Member*.

### a. Complaint Received and Notice of Receipt

When a complaint is received by the IRB, its Office of Integrity sends an acknowledgement of receipt to the person who made the complaint. A copy of the complaint is also provided to the member who is the subject of the complaint.[236]

If a complaint against a member includes allegations of bias in conducting a proceeding, the allegation of bias should be raised with the presiding member at the first reasonable opportunity. However, a complaint will normally not be dealt with until the proceedings before the member who is the subject of the complaint have been finalized.[237]

### b. Informal Resolution or Recommendation to the Chairperson

Where the Director of the Office of Integrity deems it appropriate to do so, an attempt to informally resolve the complaint to the satisfaction of both parties may be first made. Upon review of the complaint, the Director of the Office of Integrity makes a recommendation to the Chairperson regarding whether the complaint relates to the conduct of a member, is serious enough to proceed, or would be better addressed through another process.

### c. Chairperson's Decision to Dismiss Complaint or Continue to the Next Step

The Chairperson may dismiss a complaint after concluding that it is not within the scope of the procedures or that it is not serious enough to continue with an investigation. If it is within the scope and serious enough, the Chairperson may refer the complaint back to the Director of the Office of Integrity for investigation. In exceptional cases, the Chairperson may refer the complaint to another person, including an external investigator.[238] Finally, the Chairperson may also refuse to deal with a complaint if it would be better addressed through another process.

If the Chairperson dismissed the complaint or refused to deal with the complaint because it would be better addressed through another process, the person who made the complaint and the member concerned are informed of the reasons for the decision.

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236 A copy is also sent to the Assistant Deputy Chairperson and the Deputy Chairperson of the Division in which the member works.

237 In exceptional circumstances, the Chairperson may decide that the complaint will be dealt with immediately, even though the proceedings before the member have not been finalized.

238 IRB, *Procedures for Making a Complaint about a Member*. According to section 5.5 d) the Chairperson may refer the complaint "after consideration of the seriousness of the alleged conduct and other relevant factors."

### d. Investigation

If the Chairperson refers the complaint to the Director of the Office of Integrity or to another person, including an external investigator, an investigation is conducted and a report is prepared. The person who made the complaint and the member who is the subject of the complaint are informed that the complaint has been referred to the Director of the Office of Integrity or to an external investigator or to another person to investigate and make a report.

### e. Investigation Report

The investigation report will contain findings of fact, analysis and conclusions, including whether the Code of Conduct was breached. The report is provided to the Chairperson for a decision.

The identities of the person who made the complaint, the member who is the subject of the complaint and other individuals are protected to the extent it is possible to do so, "bearing in mind the principles of procedural fairness and the requirements of the *Privacy Act* and the *Access to Information Act*."[239]

### f. Consideration of Report and Decision

The Chairperson decides whether to accept the conclusions of the report and whether there was a breach of the Code of Conduct. The Chairperson informs the person who made the complaint and the member who is the subject of the complaint whether the Code of Conduct was breached, provides reasons for the decision and takes any follow-up actions, including sanctions, he or she considers appropriate.

### g. Publication of Results

The IRB will publish a yearly report of all complaints received on its website. The report may include a description of the nature of the complaints, steps taken to address the complaints and the decision taken, but will not contain information identifying individuals.

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239 Ibid., section 5.13.

### h. Accommodation of Particular Needs of Vulnerable Persons

The procedures note that in considering complaints, "[t]he IRB will make best efforts to accommodate the particular needs of vulnerable persons who make complaints where those needs are made known to the IRB."[240]

### i. Continuing Inquiry after Departure of Member

This issue of continuing an inquiry into an alleged breach of the Code of Conduct after a member has left the IRB was raised by witnesses. In his initial appearance before the Committee on 20 March 2018, Mr. Aterman stated that, in cases of complaints where a member has left the IRB, the issue was determined closed. He reasoned fair investigations involve "a neutral party talking to both sides" and "[w]hen one side is no longer there, you can't conclude the investigation."[241]

However, in a letter to the Committee dated 13 April 2018, Mr. Aterman indicated the IRB could benefit from institutional lessons by continuing inquiries, despite the departure of members against whom there have been complaints. As such, the IRB plans to modify its complaints process to continue inquiries until finalized, regardless of the departure of members. Mr. Aterman acknowledged that, in addition to informing the IRB of any existing systemic issues, doing so would provide all complaints with a resolution. Still, he noted that the board does not have the power to summon a former member for investigation. As such, former members could be invited to present their side of the story to the board. If they decline to do so, the board "may go ahead and make findings notwithstanding that."[242]

## 6. Other Accountability Mechanisms at the Immigration and Refugee Board of Canada

### a. Annual Performance Reviews of Members

Ms. Hirji voiced concern that the IRB appeared to lack initiative in proactively intervening with members' conduct and stated the board should not rely on the immigration bar to file complaints.[243] Mr. Aterman informed the Committee that the IRB does, in fact, raise issues with respect to compliance with the Code of Conduct during members' annual performance appraisal. He explained that, during the appraisal,

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240 Ibid., section 5.14.

241 CIMM, *Evidence*, 27 February 2018, 1130 (Paul Aterman).

242 CIMM, *Evidence*, 24 April 2018, 1230 (Paul Aterman).

243 CIMM, *Evidence*, 22 March 2018, 1110 (Asiya Jennifer Hirji).

managers often observe hearings, conduct reviews of audio recordings of hearings and read decisions issued by members. He further explained the review includes an assessment by managers of how members treat people who appear before them and whether they have been respectful. Finally, Mr. Aterman noted that managers also consider "statistical indicators of performance, such as the number of cases that were finalized and how quickly they were done."[244]

Mr. Aterman described what he looks for in performance reviews as follows:

> When I do an evaluation of a member, I'm looking at how they do their job. I'm not telling them they shouldn't have said yes somewhere and they should have said no somewhere else. I'm looking at whether they're respectful, whether they make the process accessible to people, whether they're efficient, I'm looking at how they participate in things like professional development. I'm not saying to them they were wrong when they said yes to one person or they were wrong when they said no to another person.[245]

### b. External Evaluation

Mr. Aterman also informed the Committee of the existence of a cyclical external evaluation done to measure the performance of the different divisions, indicating the RAD had recently undergone such an evaluation. Greg Kipling, Director General, Policy, Planning and Corporate Affairs Branch at the IRB, elaborated that the program has been in place for several years. He explained that evaluations look into pre-proceedings, proceedings themselves and post-proceedings to determine, among other matters, whether decisions were easy to understand and whether files were well prepared in advance of the hearing. Mr. Kipling clarified this type of evaluation does not focus on individual performance, but rather considers systemic issues. He concluded that the process has identified specific areas in which the IRB can improve and that "[w]e've acted in several cases on different issues that have been identified."[246]

### c. Audit

Mr. Aterman noted that there are instances where, when there is concern of an issue on a systemic level, the Chairperson may decide to have an external audit performed. As an example, he raised the current third-party audit initiated by the former Chairperson on long-term detention decisions. The audit follows judgments of the federal and superior

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244 CIMM, *Evidence*, 27 February 2018, 1140 (Paul Aterman).

245 Ibid., 1240.

246 CIMM, *Evidence*, 27 February 2018, 1240 (Greg Kipling, Director General, Policy, Planning and Corporate Affairs Branch, IRB).

courts, which heavily criticized the Immigration Division's use of long-term detention. Mr. Aterman indicated that such audits, although exceptional, are "a tool that's also available to the organization."[247]

## 7. Concerns with the Current System

### a. Complaint Process and Judicial Review

Witnesses discussed the importance of differentiating between the procedure for hearing complaints and the process of appeals and judicial review at the Federal Court. With respect to the scope of the *Procedures for Making a Complaint about a Member*, Mr. Aterman cautioned that:

> ...the purpose of the code of conduct is to set standards for how a member conducts him or herself. The code and the complaints process are not there to deal with what the member decided, in other words, whether the decision was right or wrong in law. That's a matter for the Federal Court to decide, not for the board.[248]

The IRB reinforced this assertion in its correspondence to the Committee, stating that linking sanctions for the professional conduct of a member with judgment on the merits of the member's adjudicative decisions would undermine the rule of law and would challenge the reviewing mechanisms chosen by Parliament.[249] Prof. Flaherty reinforced this view by stating that grievances under a complaints process must avoid interfering with the content of decisions. She said an appeal or judicial review of a decision provides an audit process to ensure the content of the decision is correct. She also affirmed "[c]ourts have been specifically tasked with, and are best equipped for, assessing the appropriateness of the content of the decision."[250]

Ms. Roushan contested the line drawn by Mr. Aterman between matters properly addressed through the IRB complaints process and those through judicial review. Ms. Roushan stated that section 13 of the Code of Conduct requires members to have knowledge of the law, section 14 requires members to be consistent in their decision making and section 20 requires members to have a high level of expertise and professional competence. She noted that the aspect of competence in section 20 "requires knowledge of the law, knowledge of country conditions, and knowledge of the facts of the case before them." She explained that when the requirements of these

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247 CIMM, Evidence, 27 February 2018, 1240 (Paul Aterman).

248 Ibid., 1145.

249 IRB, *Letter*, 13 April 2018.

250 CIMM, Evidence, 19 April 2018, 1115 (Michelle Flaherty).

sections are not met, "the only remedy we have is through the complaint system." She also said the complaint system is not sufficiently independent, transparent, or responsive to the needs of claimants.[251]

However, Prof. Flaherty warned of potential complications related to having a complaints process that operates parallel to courts. She noted that, in addition to the time and resources needed to address challenges in different venues, confusion may occur in cases where the two processes reached different conclusions. Prof. Flaherty also warned an overreaching complaints process could infringe upon the impartiality and independence of adjudicators. She said a "complaint process concerning the content of a decision may be construed as undue pressure in the sense that adjudicators may feel they risk sanctions if they decide in a particular manner."[252] This, in turn, would leave the administrative decision in question open to challenge upon review.

### b. Involvement of the Chairperson Versus an External Decision-maker

A much-deliberated subject during the hearings was the appropriate role for the Chairperson in the complaints process. As detailed above, the Chairperson can dismiss a complaint, can refer a case for investigation, accepts or rejects the investigation's report, and determines whether sanctions are needed and what those sanctions are. Certain witnesses maintained that complaints should be referred to an independent decision maker or panel of adjudicators, while others advocated in favour of maintaining the current role of the Chairperson.

Ms. Hirji expressed concern over a lack of independence of decision-makers within the IRB complaints process. She suggested that individuals reviewing complaints should be at arm's length to the IRB, should not interact with members and should work outside of the board offices.[253] Ms. Roushan argued in favour of an independent complaints process consisting of a three-member panel chosen from a list of pre-selected members.[254] Prof. Jacobs supported the view that the Chairperson should not make the final decision on conduct complaints. She argued that the involvement of the Chairperson in decisions related to the conduct of members does not contribute to public confidence as "questions will be raised as to whether a chair is favouring decisions that protect the image of the tribunal."[255] Ms. Robinson noted that "[e]ven with the best

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251 CIMM, *Evidence*, 22 March 2018, 1100 (Nastaran Roushan).

252 CIMM, *Evidence*, 19 April 2018, 1115 (Michelle Flaherty).

253 CIMM, *Evidence*, 22 March 2018, 1110 (Asiya Jennifer Hirji).

254 CIMM, *Evidence*, 22 March 2018, 1100 (Nastaran Roushan).

255 CIMM, *Evidence*, 19 April 2018, 1105 (Laverne Jacobs).

intentions, I think anybody in that conflict of interest, which the chairperson would be in, would struggle to make completely impartial decisions."[256]

Prof. Jacobs further said that a model complaint process should have an investigative panel and a final decision-maker (other than the Chairperson) to which the investigating panel would present recommendations. Both the investigating panel and the final decision-maker could be from the same reviewing entity, as seen, for example, in the Conseil de la justice administrative in Quebec; however, she argued the final decision-maker should be distinct and at arm's length from the investigating panel. She stated having an independent final decision-maker "avoids the kinds of issues we see with the IRB" and added that involving the Chairperson risks interfering with members' adjudicative independence.[257] According to Prof. Jacobs, this aspect "goes back into deep and long jurisprudence in administrative law, in which it's seen as a violation of the independence of a decision-maker to have the chair or anyone have an inappropriate influence on the decisions being made."[258]

With respect to the whether the final decision should be made by a panel or an individual, Prof. Jacobs stated that a panel incorporating members from different administrative tribunals has been used in Quebec, whereas an individual integrity commissioner has been used elsewhere. She argued that the decision regarding this could depend on the extent to which it is necessary at the final stage to have a decision-maker who understands the inner workings of the body and can convey that knowledge. Prof. Jacobs said, in processes such as those, if the specific knowledge is not necessary, a single individual in the form of an independent third party with knowledge of ethics would be appropriate.[259]

Prof. Houle challenged the new complaint procedure on other grounds. She noted that section 176(1) of IRPA has an existing complaint framework applicable to GIC appointees and that the IRB procedure for RAD and IAD appointees is inconsistent with the section. According to Prof. Houle, for these members, the Chairperson does not have the power to initiate an investigation nor does he or she have the power to delegate such a task to the Director of Integrity.[260] In citing the same section for another matter, Mr. Aterman acknowledged only that the section kept the IRB from exercising the specific power of

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256 CIMM, *Evidence*, 17 April 2018, 1130 (Cheryl Robinson).

257 CIMM, *Evidence*, 19 April 2018, 1105 (Laverne Jacobs).

258 Ibid., 1110.

259 Ibid.

260 CIMM, *Evidence*, 19 April 2018, 1125 (France Houle).

removing a GIC appointee as a sanction.[261] Prof. Houle submitted that when it comes to members of the ID and RPD, IRPA is silent with respect to a complaint process. She explained that even if we accept that the ID and RPD members are employees within the definition of the *Public Service Employment Act*, they cannot be subject to the Chairperson's authority because of their status as independent adjudicators. Prof. Houle added she had trouble "seeing what section of the legislation could be invoked to directly and explicitly support the existence of that power of the chair." She also said there may be associated constitutional issues, noting, in a similar manner to Prof. Jacobs, that influence from the Chairperson or the Office of Integrity on the decisions of members may violate their independence.[262]

In an opposing view, Prof. Ellis argued in a written submission to the Committee there is no person more invested in having "good and trusted adjudicative members" than the Chairperson and that an external complaints process is "ill-advised."[263] He noted that the primary goal of the IRB, and indeed the chairperson, with respect to refugee claims is their adjudication in a fair and competent manner and the perception of it being so. He elaborated that bad adjudicators therefore threaten "any Chair dedicated to getting the work of the tribunal right."[264] Along the same line, Prof. Flaherty stated that the Chairperson's role in the complaints process presents no inherent bias or unfairness. Prof Flaherty said that the Chairperson manages decision-makers at the board and, as such, should assume the same management role within the complaints process. In agreement with Prof. Ellis, Prof. Flaherty explained that in her view, "the role of the chair is to promote the success of the IRB, both in terms of accomplishing its statutory mandate and in ensuring public confidence."[265] She therefore cautioned against making assumptions about bias and supported Prof. Ellis' view that no other person at the IRB is more invested in having "good and trusted adjudicative members" than the Chairperson.[266]

Finally, Prof. Ellis suggested the following adjustment to the processes, which, he noted, could be considered in the future:

> One change that I think might eventually be considered would be for the Chair to share these final decisions in the complaints process with a committee of senior IRB officials

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261 CIMM, *Evidence*, 24 April 2018, 1255 (Paul Aterman).

262 CIMM, *Evidence*, 19 April 2018, 1125 (France Houle).

263 Ronald Ellis, *Written submission*, p. 1.

264 Ibid., p. 4.

265 CIMM, *Evidence*, 19 April 2018, 1115 (Michelle Flaherty).

266 Ibid.

> chaired by the Chair – perhaps a permanent "integrity committee" of three, with a majority vote deciding each issue.[267]

Prof. Ellis expressed concern with respect to the feasibility of an independent external complaints process. He argued that an external process is not as simple as presented by other witnesses as it effectively proposes the establishment of a tribunal.[268] According to Prof. Ellis, the members against whom a complaint would be made would have their careers and reputation at stake and would need to be represented by counsel. He explained that, among other things, any external process would need to be fair and objective, would require an appeal process and would need to permit the IRB to be a party to the proceedings. Finally, Prof. Ellis raised a number of questions related to operational aspects of an independent process, including but not limited to who would administer the process, who would select the individuals appointed, what their qualifications would need to be and what rules of procedure would need to be created.[269]

Prof. Ellis also voiced concern with respect to the "internal dynamics and strength of the IRB" and "on the independence of the individual adjudicators."[270] He explained that, as an institution in which decision-makers are part of a team pursuing fair, effective, and consistent decisions in a contentious and difficult field, confidence in leadership to provide an agreeable adjudicative environment is important. Prof. Ellis further explained that adjudicators exposed to public and external reviews of their performance "would begin to look to themselves for their own protection in a way that would be destructive of the institutional morale and team environment and, most importantly, of the individual adjudicators' commitment to fearless decision-making."[271] In disagreeing with this view, Prof. Houle provided the example of Quebec's Conseil de la justice administrative, a council that overseas complaints against members of the three largest administrative tribunals in Quebec.[272] She explained that the Conseil operates externally

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267 Ronald Ellis, *Written submission*, p. 5.

268 Ibid., p. 3.

269 Ibid., p. 4.

270 Ibid., p. 2.

271 Ibid.

272 Prof. Houle states that the Conseil de la justice administrative overseas comparable volumes of annual decisions and comparable numbers of members as the IRB. CIMM, *Speaking Notes*, 19 April 2018, p. 2 (France Houle).

from administrative tribunals, can sanction tribunal members, and that Prof. Ellis's concerns have not materialized over its 20-year existence.[273]

Since concerns about the IRB complaints review process were raised by courageous individuals and reported in the media, the IRB has made significant changes to their complaints process to allow it to be better managed from both a human resources management perspective and in the public interest.

Many witnessed called for the process to be further modified to make it fully independent from the Chair of the IRB, but some witnesses also testified that the Chair of the IRB should bear ultimate responsibility for the integrity of the Board and should be accountable to the public interest. Additionally, concerns were raised that the primary goal of the board is to ensure competent decisions are made with independence and integrity, in a fashion which maintains the credibility of the IRB and its processes.

Whether the new process has restored the credibility of the IRB remains to be seen. However, the issue of the perceived need for complaints processes, which are resolved independent of the administrative tribunal administration, is an issue which affects all federal administrative tribunals. Any solution to this question of the need for independent judicial oversight should be addressed using an all of government approach. Oversight should be commensurate with the level of authority held by the decision maker. The Committee recommends:

**Establishing an independent federal review board for complaints against all federally appointed adjudicators**

**Recommendation 6**

**That the Government of Canada, through the Privy Council Office, establish a task force with representation from all departments whose portfolios involve the oversight of federal administrative tribunals to review the need for an independent review board for complaints brought by the public against federally appointed adjudicators, including members of the Immigration and Refugee Board of Canada; and to consider whether complaints processes against public service positions and Governor in Council appointments within the federal administrative tribunal framework should be subject to different levels or avenues of review.**

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273 CIMM, *Evidence*, 19 April 2018, 1125 (France Houle).

### c. List of Sanctions

Prof. Jacobs lists the presence of "sanctions" as one of the four constitutive elements of a comprehensive tribunal code of conduct.[274] The importance of a public list of sanctions was also highlighted by Ms. findlay who suggested that unless members know the consequences of their behaviour and know that they will be held publicly accountable for it, proper behaviour is only considered "something about the way you do your job" rather than about standards with consequences.[275] Ms. Robinson agreed.[276]

By way of example, Marilyn King, Registrar, Justices of the Peace Review Council, informed the Committee that sanctions faced by Justices of the Peace for misconducts are set out in the *Justices of the Peace Act*. Ms. King stated that:

> After a hearing, if there is a finding of judicial misconduct, the possible dispositions include a warning; a reprimand; an order of an apology; an order of specified measures, such as further education or treatment as a condition of continuing to sit as a justice of the peace; a suspension without pay for up to 30 days; a suspension with pay; or if not any of those, a recommendation to the attorney general for removal from office.[277]

Mr. Aterman noted that he believed that board members were aware that sanctions for violations of the Code of Conduct could range from a reprimand, training, removal from the hearing room, and termination.[278] Nevertheless, he informed the Committee that the protocol could be amended to indicate the range of possible sanctions within the board's authority to impose, whether for public servants or GICs.[279]

The Committee acknowledges the contribution to transparency provided by a publicly available list of sanctions for violations of the Code of Conduct. The Committee recommends:

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274 CIMM, *Evidence*, 19 April 2018, 1110 (Laverne Jacobs).

275 CIMM, *Evidence*, 17 April 2018, 1135 (barbara findlay).

276 CIMM, *Evidence*, 17 April 2018, 1135 (Cheryl Robinson).

277 CIMM, *Evidence*, 24 April 2018, 1135 (Marilyn King, Registrar, Justices of the Peace Review Council).

278 CIMM, *Evidence*, 24 April 2018, 1220 (Paul Aterman).

279 Ibid., 1255.

**Amending the Code of Conduct for Members of the Immigration and Refugee Board of Canada**

**Recommendation 7**

**That the Immigration and Refugee Board of Canada institute an open and transparent process for continuous improvement to its Code of Conduct and that the Immigration and Refugee Board of Canada publish within the Code possible sanctions that could be imposed on a member upon violation of the Code.**

### d. Review of Complaint System after One Year

The recent implementation of the new IRB complaints process and the forthcoming external review of the Procedures raised the question of the utility of initiating changes before receiving feedback from the review. Prof. Rehaag submitted that given the novelty of the new system, it should be given "a bit of time to run its course."[280] Mr. Brouwer observed the new process is within the board's jurisdiction to create and avoids undue interference with the independence of decision-makers. He added that it represents "a very significant step forward for the board, and it's one that needs to be tried before being rejected outright."[281] Prof. Ellis noted that he is impressed with the new process and that it would be sensible "to allow it to function for some period of time, and to consider how it might be adjusted after that performance experience has been evaluated."[282]

The Committee acknowledges the recent steps taken by the IRB to reform its complaint process and recognizes that the new *Procedures for Making a Complaint about a Member* have only been implemented since 21 December 2017. The Committee also acknowledges that the external review set to occur one year after initial implementation could provide insight into the benefits and drawbacks of the new procedure. The Committee recommends:

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280 CIMM, *Evidence*, 27 March 2018, 1100 (Sean Rehaag).

281 CIMM, *Evidence*, 27 March 2018, 1215 (Andrew Brouwer).

282 Ronald Ellis, *Written submission*, p. 5.

**Reviewing and reporting back on the complaints process at the Immigration and Refugee Board of Canada**

**Recommendation 8**

**That the Immigration and Refugee Board of Canada report back to this Committee in February 2019 with a comprehensive report on the status of complaints against members brought under the current complaints process, and conduct a comprehensive review of the current complaints, with a particular emphasis on the need for independence in the complaints investigation and adjudication process, within three years.**

# LIST OF ACRONYMS

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|---|---|
| GIC | Governor in Council |
| IAD | Immigration Appeals Division |
| ID | Immigration Division |
| IRB | Immigration and Refugee Board of Canada |
| IRCC | Immigration, Refugees and Citizenship Canada |
| LGBTQ | Lesbian, Gay, Bisexual, Transgender and Queer |
| OTMB | Open, transparent and merit-based |
| PCO | Privy Council Office |
| PS | Public Service |
| RAD | Refugee Appeal Division |
| RPD | Refugee Protection Division |
| SOGIE | Sexual Orientation, Gender Identity and Expression |

# APPENDIX A
# LIST OF WITNESSES

| Organizations and Individuals | Date | Meeting |
|---|---|---|
| **Immigration and Refugee Board** | 2018/02/27 | 98 |
| Paul Aterman, Acting Chairperson | | |
| Greg Kipling, Director General<br>Policy, Planning and Corporate Affairs Branch | | |
| **Immigration and Refugee Board** | 2018/03/20 | 101 |
| Paul Aterman, Acting Chairperson | | |
| Greg Kipling, Director General<br>Policy, Planning and Corporate Affairs Branch | | |
| **Privy Council Office** | | |
| Donnalyn McClymont, Assistant Secretary to the Cabinet<br>Senior Personnel Secretariat | | |
| Jennifer Thorne, Acting Director, Appointments<br>Senior Personnel Secretariat | | |
| **As individuals** | 2018/03/22 | 102 |
| Raoul Boulakia, Lawyer | | |
| Chantal Desloges, Lawyer<br>Desloges Law Group | | |
| Asiya Jennifer Hirji, Barrister and Solicitor | | |
| Bashir Khan, Lawyer, Refugee Law | | |
| Nastaran Roushan, Lawyer | | |
| **As individuals** | 2018/03/27 | 103 |
| Sean Rehaag, Associate Professor<br>Osgoode Hall Law School, York University | | |
| Preevanda Sapru, Lawyer | | |
| **Canadian Association of Refugee Lawyers** | | |
| Andrew Brouwer, Vice-President | | |
| **Canadian HIV/AIDS Legal Network** | | |
| Maurice Tomlinson, Senior Policy Analyst | | |

| Organizations and Individuals | Date | Meeting |
|---|---|---|
| **Rainbow Railroad** | 2018/03/27 | 103 |
| Kimahli Powell, Executive Director | | |
| **Rainbow Refugee** | | |
| Sharalyn Jordan, Board Chair | | |
| **Rainbow Resource Centre** | | |
| Michael Tutthill, Executive Director | | |
| **As individuals** | 2018/04/17 | 104 |
| barbara findlay, Q.C., Lawyer | | |
| Cheryl Robinson, Associate Lawyer<br>Mamann, Sandaluk & Kingwell LLP | | |
| **As individuals** | 2018/04/19 | 105 |
| Michelle Flaherty, Professor<br>University of Ottawa | | |
| France Houle, Associate Dean, Undergraduate Studies<br>Faculty of Law, Université de Montréal | | |
| Laverne Jacobs, Associate Professor and Director of Graduate Studies<br>Faculty of Law, University of Windsor | | |
| **As an individual** | 2018/04/24 | 106 |
| Laverne Jacobs, Associate Professor and Director of Graduate Studies<br>Faculty of Law, University of Windsor | | |
| **Canada Employment and Immigration Union** | | |
| Crystal Warner, National Executive Vice-President | | |
| **Immigration and Refugee Board** | | |
| Paul Aterman, Acting Chairperson | | |
| Greg Kipling, Director General<br>Policy, Planning and Corporate Affairs Branch | | |
| **Justices of the Peace Review Council** | 2018/04/26 | 107 |
| Marilyn King, Registrar | | |

# APPENDIX B
# LIST OF BRIEFS

## Organizations and Individuals

**Canadian Bar Association**

**Canadian Council for Refugees**

**Canadian HIV/AIDS Legal**

**Network Ellis, S. Ronald**

**Jacobs, Laverne**

**Rehaag, Sean**

# REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* (Meetings Nos. 98, 101, 102, 103, 104, 105, 106, 107, 114 and 115) is tabled.

Respectfully submitted,

Robert Oliphant
Chair

# Supplementary Report by the New Democratic Party (NDP)

Preamble:

Globally, we are witnessing a migration crisis the likes of which have not been seen since World War II. The United Nations High Commissioner for Refugees estimates that there now 68.5 million people who have been forced from their homes to escape conflict, persecution, and disaster. Of those, 25.4 million are refugees. The UNHCR notes that the increase of refugees from 2016 to 2017 was the highest single year increase they have ever seen, with 2.9 million more people fleeing their country of origin over the last 12 months[i].

Tragically, as displacement and forced migration increases, the willingness to share in the responsibility to provide vulnerable people a safe haven to rebuild their lives is decreasing, especially amongst the wealthiest nations in the world. Canada has thus far gone against that trend, remaining a welcome nation. The NDP believes that is not just because of Canada's multiculturalism and humanitarian spirit, but also because by and large Canadians respect and are confident about the integrity of our immigration system. However, that trust and support is not guaranteed, but something that must be continually earned.

A recent influx of asylum seekers crossing into Canada irregularly from the United States has put strain on Canada's refugee determination system (RDS) and could shake the trust Canadians have in the system if the situation is not managed properly. Chronic underfunding of the IRB and a failure of successive government to fill Board Member vacancies has resulted in a reduced capacity for the IRB to hear claims in a timely fashion. By end of 2017, the IRB's case backlog had reached 43,000 cases and as of early April 2018, the IRB case backlog had grown to 53,000 and that backlog was increasing by over 2,000 cases per month.

Given this situation and the advocacy efforts the NDP has undertaken in support of providing additional funding to the IRB since 2017, the NDP would have liked to this study include an examination of IRB funding. Unfortunately, this was not part of the mandate.

Aside from the intense pressure resulting from chronic underfunding, the IRB had come under intense scrutiny beginning in January 2018 due to investigative journalism that uncovered disturbing information and claims about specific Board Members failing to live up to the high standard the position demands. Two incidents that made national headlines included the troubling conduct of Ms. Natalka Cassano[ii], and Mr. Michael Sterlin[iii]. Credit must be given to the journalists involved for bringing these stories to light, as without them, this study likely would not have happened.

Introduction:

The Immigration and Refugee Board (IRB) is a foundational piece of Canada's immigration system. Acting at arms-length from the government, the IRB conducts hearings regarding the claims of individuals and families to determine admissibility to Canada, detention review, and the granting of protected person

status. Unless a decision is granted leave to be challenged at the federal court, the IRB is the decision maker on whether or not an individual or family can remain in Canada. The independence provided to IRB decision makers allows the Board to examine each case based on their merit. As such, Canada's model, and the IRB specifically are respected globally for its approach. This is especially the case for Canada's refugee determination system (RDS) given the key role the IRB plays in maintaining the system's integrity. Any individual that makes an asylum claim in Canada, that is, anyone who is not selected for resettlement in Canada under the Government Sponsored Refugee (GAR) program, the Privately Sponsored Refugee (PSR) program, of the Blended Visa Office Referred (BVOR) program, appears before the IRB to have their claim determined. If successful, they will be provided protected person status in Canada. If unsuccessful, they can appeal within the IRB, and ultimately request leave to challenge the decision at federal court; but any unsuccessful claim will eventually lead to the individual or family being removed from Canada.

It is important that the IRB operates at arms-length from the federal government. As part of Budget 2017, the government mandated the IRB to undertake an independent review of its operations to determine how efficiency and productivity could be increased. That study is set to be completed and made public in early June 2018, and an interim report was provided to the IRB and the Minister in late 2017- early 2018.[iv] Through independent consultation with key stakeholders, the NDP had heard there was concern that significant restructuring, a reduction of independence, or the outright elimination of the IRB was possible. The NDP had requested the IRB table a copy of the interim report at committee during this study so that committee members could be better informed as we undertake this study and to reassure witnesses appearing before the committee that criticisms related the appointment or complaints processes of the IRB would not contribute to the potential reduction of independence or outright elimination of the IRB. Unfortunately the IRB declined that undertaking.[v] It remains that the NDP is concerned that some stakeholders were not as forthcoming with their comments as they might have been otherwise as a result of this fear.

The NDP share the view of stakeholders that have expressed support for the IRB and agree with those who feel that the IRB should be maintained, that it should remain independent, that it should be transparent and accountable, and that it should be adequately funded to ensure it can fulfill its mandate timely and efficiently. The NDP believes in good faith that this study aimed to improve and strengthen the integrity of the IRB, not undermine it.

This study sought to examine the appointment, training, and complaint adjudication processes of the IRB, and to provide the government with recommendations on how best to proceed. While the NDP agrees with the general direction of the majority of the report's recommendation; however, the NDP feels that key recommendations brought forward by witnesses pertaining to the call for a truly independent complaint and disciplinary oversight mechanism were ignored as the committee adopted a 'wait and see' approach. As well, it is the view of the NDP that additional valuable insights in a number of areas were overlooked by the committee.

With this in mind, the NDP puts forward additional recommendations which would strengthen the IRB, provide its members with better training, and increase the transparency and accountability of the IRB to the public.

Appointments:

As stated in the preamble, this study was undertaken largely because of the national headlines made regarding the unbecoming and unacceptable behavior of appointed Board Members. However, it must always be acknowledged that an ounce of prevention is worth a pound of cure; the higher quality candidates appointed, theoretically the less likely the IRB will have to deal with serious complaints regarding conduct and decisions. While the examination of IRB funding was not included in this study, it is important to note the issue of funding was brought to the attention of the committee by both the Acting Chairperson of the IRB, Mr. Paul Aterman and the National Executive Vice-President of the Canada Employment and Immigration Union (CEIU) Ms. Crystal Warner. First, without funding there can be no appointments made. More specifically to both their testimony, it is difficult to attract high quality candidates for short-term, insecure positions; especially in situations that require relocation to high cost of living areas of Canada.

Mr. Aterman explained to the committee that he believed, "the bigger challenge with that money is to be able to find and hire competent decision-makers who are willing to come to the board for a short term"[vi]. When later asked why only short-term appointments were being made, Mr. Aterman stated, "it's because the funding is limited for two years"[vii].

This was later reiterated from the Board Member perspective by Ms. Warner who explained:

> "I've worked in Vancouver, arguably the most expensive city in Canada. You're going out to try to appoint people who have families, who have mortgages to pay that are astronomical in cities like Vancouver, and you're trying to find someone who is willing to take a chance on a one-, two-. Or three-year mandate. There's stress involved – I would see that stress in them – with being renewed, and with constantly talking and being concerned about whether or not they will be reappointed. So we're adding another incredible amount of undue stress on decision-makers who are already dealing with really sensitive and challenging work."[viii]

Potentially as a result of these issues, there have been for quite some time a large number of vacancies at the IRB. NDP MP Jenny Kwan (Vancouver-East) noted to Mr. Aterman that:

> "According to the information on appointments provided to us on the appointments, there are some 26 vacancies. Has the IRB made requests for the government to fill the outstanding Order in Council appointments? For example, in Calgary there has been a vacancy for 2,929 days, in Toronto for 534 days."[ix]

Mr. Aterman noted that, "We certainly make our needs known to the government, yes."[x] It is the opinion of the NDP that this highlights the inadequate funding provided to the IRB.

Additionally, the composition of the Board was also brought up by Ms. Warner, and by immigration lawyer Ms. Preevanda Sapru. Both agreed that the IRB should do more to appoint a diverse variety of individuals to the Board so that it's a better reflection of Canadian society and of those individuals appearing before it.

Ms. Sapru explained:

> "The IRB deals with people fleeing hundreds of countries of different cultures, of different norms and ways of being and behaving. There needs to be an equal representation of different cultures – at the organizational level, not just among board members – so that there is an understanding and empathy to deal with the people they are dealing with on an ongoing basis."[xi]

Ms. Warner supported this notion, adding:

> "We do agree with many of the comments we have heard coming out of this committee. Decision-makers of the board should be reflective of the communities of the people who come before, so equity staffing of LGBTQ persons, persons with disabilities, and racially visible persons should be not only encourage but mandated."[xii]

Finally, while efforts have been undertaken in recent years to make IRB appointments less partisan, Professor Ronald Ellis, in a written submission, informed the committee of a potentially better and even less partisan appointment mechanism. Prof. Ellis outlines in his submission the United Kingdom's Judicial Appointments Commission, which can be composed of current members, outside experts, and representatives from the public. The Commission would then inform the government on who was selected and the government would either appoint, or have mechanisms to review or decline to appoint. Prof. Ellis noted that in the U.K since 2007, "there has been virtually no refusal or deferment of any recommendation", made by their commissions.[xiii]

With the following testimony in mind, the NDP recommends the government take the following actions regarding the appointment of Board Members to the IRB:

**Recommendation 1:**

**That the government of Canada provide stable, adequate, long-term funding to the IRB to ensure that highly competent Board Members can be attracted and retained.**

**Recommendation 2:**

**That all Board Member vacancies be filled expeditiously.**

**Recommendation 3:**

**That the government of Canada work with the IRB to institute an equity hiring program to increase Board Member diversity so as to ensure the IRB is more reflective of the people appearing before it.**

**Recommendation 4:**

**That the government of Canada further de-politicize the IRB appointment process by replacing the current GIC appointment model with that of the U.K.'s Judicial Appointments Commission.**

Training:

The world around us is rapidly evolving. Integration and human migration has seen ideas, values, and technology to just name a few things, shared and moved around the globe at a rate never seen in our history. As a result, social norms throughout the world are changing and changing quickly. In some cases, societies are embracing progressive change, becoming more, open, tolerant, and diverse. In other cases, societies are pushing back and becoming more socially conservative, less tolerant, and more divided. Countries that were once open and accepting of newcomers and refugees are in some instances becoming more closed off and unwilling to provide asylum. The nature of conflict is ever changing.

It is against this backdrop that the IRB decides whether or not to grant a person or family protected status in Canada, and it is for that reason that it is vital that Board Members receive high-quality, up-to-date ongoing training. Even the best appointee can make poor decisions if they are not adequately trained, are not up to date on issues that impact claims, or have not learned the best practices for methods for determining claimant credibility etc.

The NDP supports recommendation 4 and recommendation 5 in the main report.

Further to those recommendations, the NDP would like to note the testimony of Mr. Maurice Tomlinson of the Canadian HIV/AIDS Legal Network who made the following recommendations on LGBTQ training and cultural competency:

> "The first is multi-day LGBT sensitivity training for IRB members that engages individuals from refugee-sourced countries who have lived experiences. The second is meaningful dialogues between the IRB and agencies and lawyers serving LGBT refugees to establish clearer guidelines and expectations. The third is an opportunity for claimants and/or counsel to provide post-hearing feedback that can improve IRB members' questioning and not adversely affect claims."[xiv]

Mr. Tomlinson stressed the importance of prolonged training and feedback loops because in his experience working abroad on these issues, "we're asking them to make a cultural shift, and that can't happen in three hours."[xv]

Immigration lawyer Ms. barbara findlay expressed the need for follow-up and evaluation to ensure training was effective. She stated:

> "I think there needs to be some structured follow-up and evaluation. I certainly think there needs to be some sort of exam or evaluation at the end of the training so that the board can be satisfied that its member has actually absorbed the information; and the member subsequently should be evaluated against the training. It's a problem in all areas of judicial education."[xvi]

With this information in mind, the NDP recommends that the government go further than as recommended by the main in report in recommendation 5; as this recommendation only calls for members' comprehension and application of learning be examined as part of the review. Therefore, the NDP recommends:

**Recommendation 5:**

**That the government of Canada work with the IRB to institute periodic training reviews as part of the ongoing professional development of members to ensure that the training is being absorbed, and if not, follow-up training can be provided in a timely manner.**

Complaints:

It is on this aspect of the study that the position of the NDP contrasts significantly with that of the government members of the committee and the IRB itself. During his first appearance before the committee Mr. Aterman explained that they engaged in consultations with key stakeholders on how to move forward with a new complaints mechanism. In his second appearance he informed the committee the standing stakeholder table consisted of: the Canadian Bar Association (CBA), the Canadian Association of Refugee Lawyers (CARL), the Refugee Lawyers Association, the Quebec Immigration lawyers association (AQAADI), Canadian Association of Professional Immigration Consultants (CAPIC), and the Canadian Council for Refugees (CCR).[xvii] It is significant to note that Mr. Aterman explained in his first appearance that one key recommendation that the IRB did not act on was for the complaint process to be handled independently even though he acknowledged that, "They took the position that all the complaints needed to be dealt with by someone outside of the organization, an independent third party."[xviii]

During his second appearance, NDP MP Jenny Kwan pressed Mr. Aterman on why this recommendation was not acted on. He stated, "the board is responsible for managing its own people, and fundamentally it's the chair's obligation to do that. The Chair is paid and is expected to act in the interest of the institution."[xix]

The NDP is of the view that the new complaint process, while a step in the right direction, if the Chair can oversee whether or not to proceed with a complaint, it remains that it is still not an independent process. Under this system, the real or perception of conflict pertaining to the complaint process will continue to cast a shadow over the integrity of the IRB. While the NDP notes that the Director of Integrity, who is now in charge of handling complaints, leads a "somewhat lonely life"[xx] because they aren't included in management meetings, the NDP feels that the IRB should have adopted a completely independent process as recommended by stakeholders through the government's own consultation process. An independent, unbiased examination of complaints is essential to the openness and accountability. This opinion was also shared by the following witnesses:

- Professor Ms. Laverne Jacobs[xxi]
- Immigration Lawyer Ms. Cheryl Robinson[xxii]
- Immigration Lawyer Ms. barbara findlay[xxiii]

- Immigration Lawyer Ms. Preevanda Sapru[xxiv]
- Immigration Lawyer Ms. Nastaran Roushan[xxv]
- Immigration Lawyer Ms. Asiya Jennifer Hirji[xxvi]

Ms. Roushan put it bluntly when she stated:

> "You cannot dress up an office within the IRB as independent, regardless of where it is located or regardless of how 'isolated' it is. You cannot dress up a complaint system as independent when the chair has ultimate discretion over whether or not to even look at a complaint."[xxvii]

During the study an issue was raised by witnesses that in some cases, outstanding complaints were closed prior to be finalized because the Member had left the IRB and there was no ability to pursue the complaint further. While during his early appearances Mr. Aterman suggested there was no way the IRB could change this situation, while making his final appearance at the committee, he later informed committee members that the IRB had heard the concerns about this and was moving forward with examining avenues to finalize cases in situations where IRB members had left the IRB with outstanding complaints against them.[xxviii] This is a welcomed development and one that should be recognized.

After a complaint was lodged, some witnesses appearing before the committee noted the difficulties that could arise from appearing before an IRB member that they have lodged an active complaint against. In some cases, this would be with the same client, in other cases, new client but same IRB member, or in some cases additional delays or perhaps restarting the whole hearing process is examined. Part of this was a result of the undue amount of time it took to resolve complaints. Ms. Roushan explained:

> "For example, in what happened with Cassano, it took about 10 months for there to be a final decision. Hearings ongoing with her on which she hadn't made a determination, hearing that had been adjourned for another date, were just left standing. There were claimants who, for about 10 months, didn't know when their next hearing date would be, and then they had a letter about a year afterward saying, 'well, you can have a de novo with a new member.' We can just imagine the ramifications, when they had been so traumatized already, to have to wait during that time."[xxix]

If a complaint is found to valid, there are a range of sanctions that can occur. Throughout the study, having a member undergo additional, complaint specific training was discussed. Mr. Aterman continually expressed that examination of the effectiveness of this additional training was done during the annual review. However, immigration lawyer Ms. Cheryl Robinson expressed concern with the current lack of training follow-up or examination of effectiveness. She explained that:

> "Basically, you're making refugee claimants who come after the complaint and training into guinea pigs to see if the training took effect. I also think that if we looked to other bodies, for example the law society, we'd see that when people are reinstated they're not just put in without any supervision. There are terms for supervision and follow-up. I think that would be more appropriate after a compliant."[xxx]

While termination from the Board is currently a possible sanction for both public service Board Members and GIC Board Members, in her appearance before the Committee, Ms. Donnalyn McClymont, Assistant Secretary to the Cabinet, Senior Personnel Secretariat, Privy Council Office, explained the difficult, long process, and high bar required for a GIC appointment to the IRB to be terminated[xxxi]. When asked if this was appropriate, while noting that the process should be fair, it was agreed upon that there should be a reasonable process for terminating a GIC appointee to the Board for misconduct. Mr. Brouwer stated that, "there also needs to be a range of clear consequences for bad behavior, from training through to removal from any hearing or decision-making role to outright termination"[xxxii].

Lastly, concerns were brought to the committee about the public reporting of founded complaints against IRB members. In her dealing with the complaints process, Ms. Roushan noted that:

> "One of the things I actually asked the IRB to tell me was how many complaints had been made about her [Cassano] in the past, the nature of the complaints, and why they hadn't done anything about it. Because she is no longer there, they claim that they don't have to give this information over."[xxxiii]

It is the opinion of the NDP that to ensure accountability and transparency for the IRB, and to maintain public trust in the institution, founded complaints and the corresponding sanctions should be public reported on annually. This would be similar to other professional bodies in Canada such as the Canadian Bar Association.

Given this, the NDP recommends the following:

**Recommendation 6:**

**That the government of Canada work with the IRB to implement a fully-independent complaints investigation mechanism.**

**Recommendation 7:**

**That the independent complaint body to report its findings within 90 days of a complaint being lodged. Should the body require additional time for an investigation, the individuals involved should be notified of this, and made aware of the status of the investigation.**

**Recommendation 8:**

**That government of Canada work with the IRB to put in place a mechanism to examine the effectiveness any given sanction has had on the sanctioned IRB member prior to fully reinstating them to ensure the issue has been adequately addressed.**

**Recommendation 9:**

**That the government of Canada work with the IRB to review and implement an updated list of sanctions and the guidelines describing when each sanction is appropriate; and that possible sanctions escalate up to and including termination, including for GIC appointees.**

**Recommendation 10:**

**That the government of Canada work with the IRB to produce an annual public reporting of any and all founded complaints and their corresponding sanctions against IRB members.**

Conclusion:

The NDP will continue to welcome any and all opportunity to examine and produce recommendations to improve the effectiveness of the IRB. The NDP share the view of witnesses that have expressed support for the IRB and feel that the IRB should be maintained and remain an arms length independent entity of government. As well, the NDP feels strongly that the IRB should be adequately funded to ensure it can fulfill its mandate in a timely, efficient and effective manner. While complaints against a small number of IRB members made national headlines and required swift and strong action, the NDP believes that the majority of IRB members do their important job with a commendable degree of professionalism and a great deal of care and sensitivity given the vulnerable people that they are making such life-impacting decisions for. The IRB holds a vital role in Canada's immigration system and the system itself as a whole provides a model that many nations in the world can look to. It is for these reasons that the NDP supports ongoing examination of the IRB. The government of Canada and the IRB must work hard to maintain the high expectations placed on the Board.

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[i] **Edwards, Adrian.** "Forced displacement at record 68.5 million." **UNHCR. 19 June 2018**
[ii] **Hill, Brian and Russell, Andrew.** "Refugee jude accused of 'incompetence' in Global News investigation, 'no longer an employee of the IRB'". **Global News. 8 March 2018**
[iii] **Hill, Brian and Russell, Andrew.** "Lawyers allege 'sexist,' 'aggressive' behavior by powerful immigration, refugee judges". **29 January 2018**
[iv] Immigration and Refugee Board Review – Terms of Reference. **Government of Canada.**
[v] **CIMM,** Evidence, **27 February 2018, 12:05 (Paul Aterman)**
[vi] **CIMM,** Evidence, **20 March 2018, 11:45 (Paul Aterman)**
[vii] **CIMM,** Evidence, **20 March 2018, 12:00 (Paul Aterman)**
[viii] **CIMM,** Evidence, **24 April 2018, 11:20 (Crystal Warner)**
[ix] **CIMM,** Evidence, **27 February 2018 12:05 (Paul Aterman)**
[x] **Ibid.,**
[xi] **CIMM,** Evidence, **27 March 2018, 12:15 (Preevanda Sapru)**
[xii] **CIMM,** Evidence, **24 April 2018, 11:15 (Crystal Warner)**
[xiii] **CIMM, Written Submission, p.10-11. Ronald Ellis**
[xiv] **CIMM,** Evidence, **27 March 2018, 11:20 (Maurice Tomlinson)**
[xv] **CIMM,** Evidence, **27 March 2018, 12:30 (Maurice Tomlinson)**
[xvi] **CIMM,** Evidence, **17 April 2018, 11:40 (barbara findlay)**
[xvii] **CIMM,** Evidence, **27 February 2018, 11:50 (Paul Aterman)**
[xviii] **CIMM,** Evidence, **27 February 2018, 11:50 (Paul Aterman)**
[xix] **CIMM,** Evidence, **20 March 2018, 11:25 (Paul Aterman)**
[xx] **CIMM,** Evidence, **27 February 2018, 11:50 (Paul Aterman)**
[xxi] **CIMM,** Evidence, **24 April 2018, 11:10 (Laverne Jacobs)**
[xxii] **CIMM,** Evidence, **17 April 2018, 11:40 (Cheryl Robinson)**
[xxiii] **CIMM,** Evidence, **17 April 2018, 12:50 (barbara findlay)**
[xxiv] **CIMM,** Evidence, **27 March 2018, 12:50 (Preevanda Sapru)**

[xxv] CIMM, Evidence, 22 March 2018, 11:00 (Nastaran Roushan)
[xxvi] CIMM, Evidence, 22 March 2018, 11:10 (Asiya Jennifer Hirji)
[xxvii] CIMM, Evidence, 22 March 2018, 11:00 (Nastaran Roushan)
[xxviii] CIMM, Evidence, 24 April 2018, 12:25 (Paul Aterman)
[xxix] CIMM, Evidence, 22 March 2018, 11:40 (Nastaran Roushan)
[xxx] CIMM, Evidence, 17 April 2018, 11:40 (Cheryl Robinson)
[xxxi] CIMM, Evidence, 20 March 2018, 12:25 (Donnalyn McClymont)
[xxxii] CIMM, Evidence, 27 March 2018, 12:20 (Andrew Brouwer)
[xxxiii] CIMM, Evidence, 22 March 2018, 11:00(Nastaran Roushan)